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IN THE

Supreme Court of the United States.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a corporation, *Petitioner.*

vs.

SALLIE E. HILLMON, *Respondent.*

662.

BRIEF AND ARGUMENT FOR RESPONDENT, IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI.

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The petitioner has served upon us its petition for a writ of *certiorari* herein, but has not favored us with any copy of its brief or the argument which it is stated in said petition, has been filed in support thereof, and which argument presumably sets forth more fully the grounds of the application and cites authorities which it is claimed bear upon the questions discussed. As the petition and notice of the application was not served upon us until late on Saturday evening, May 4th, 1901, without its brief or argument therein mentioned, we labor under unusual difficul-

ties in preparing an appropriate answer or reply thereto.

We desire, however, to submit a short argument in opposition to the application for a writ of *certiorari*, and shall follow and answer, in their respective order, the various subdivisions as numbered and set out in the petition for the writ.

I.

STATEMENT.

(Petition, page 1, etc.)

The respondent brought three separate actions at law July 13th, 1880 (more than twenty years ago), against the Connecticut Mutual Life Insurance Company of New York, The New York Life Insurance Company, and the Mutual Life Insurance Company of New York, on policies of insurance issued by said companies, respectively, for her benefit on the life of her husband, John W. Hillmon, whom, she alleged, was dead. The said insurance companies each answered, alleging in substance that said John W. Hillmon was not dead, and that the dead body produced was not that of said Hillmon, but the body of some other person procured for the purpose of imposing upon the insurance companies and collecting the policies, although Hillmon was still living. It was incidentally alleged that all this had been planned in advance by Hillmon and persons other than the plaintiff, that is to say, that a false body had not only been produced as that of Hillmon, but that Hillmon himself, still being alive, had conspired with others to have this done. There was no charge in the answers that the plaintiff, the beneficiary, had any knowledge of, or was in any manner connected with the alleged fraud or conspiracy, and counsel for the

insurance companies, in his opening statement to the jury (Record, 138), in substance disclaimed that any such charge had been made. The answer also set up a release alleged to have been executed by Mrs. Hillmon and contained a general denial. The reply (Rec. 20 to 22) alleges that the release set up in the answer was procured by fraud and was without consideration. The issues being the same in all, the three cases were consolidated for trial. Six trials have been had, each occupying on an average more than twenty days each, the last trial consuming nearly five weeks. The principal point contested at all of these trials has been that of the identity of the dead body produced as that of Hillmon, the insured. That the insurance companies regarded that as the substantial question in dispute appears by the special instructions asked by it at the last trial; the insurance companies requested the Court in various forms to charge "that the REAL QUESTION in the case is whether or not John W. Hillmon died at the time and in the manner in the petition alleged." (Special instruction No. 1, Record page 1904, and special instruction No. 28, Record page 1909.) The trial judge, in substance, adopted these requests in that respect, and charged the jury as follows:

"In order that the plaintiff may recover in these cases, it is her duty to prove, by a preponderance of the evidence, that her husband died as claimed by her, in March, 1879, that is to say, whether it was his corpse that was brought to Lawrence in April of that year. If she should fail in so proving, your verdict should be for the defendants, but if she should succeed in so proving, your verdict should be in her favor." (Record, 1919.)—And thus the special matter of alleged fraud was substantially submitted to the jury.

Upon this question of identity, a vast mass of testimony was introduced. The jury in finding for the

plaintiff under the charge of the Court, necessarily found that the dead body produced was that of Hillmon. It is now claimed that, notwithstanding the answer, the opening statement of counsel, the special instructions asked and the charge given, and notwithstanding the dead body was that of Hillmon, the insured, yet that certain technical reasons exist why this judgment should be reversed and a seventh trial of the case precipitated.

In order to make plain what is to immediately follow, we draw the Court's attention to the fact that before the last trial The New York Life Insurance Company had settled with the plaintiff. The case was then consolidated as to the Connecticut Mutual Life Insurance Company and the Mutual Life Insurance Company of New York, for the last trial. Subsequent to the last trial and before either the hearing of the case in the Court of Appeals or the printing of the record therein, the Mutual Life Insurance Company of New York also settled with the respondent and its writ of error has been dismissed.

Upon these facts we desire to make the following preliminary objection to the consideration of the record which is presented here with the petition for a writ of *certiorari* so far as reference in said petition is made to the alleged bill of exceptions contained therein, set forth at pages, Record, 129 to 1927.

The respective pages of the record referred to by the petitioner in said petition to support its claims of error, are in a bill of exceptions set forth at pages Record 129 to 1927, which, as shown at page 1926, purports to have been taken by said petitioner, The Connecticut Mutual Life Insurance Company, in a case shown at page Record 129, to have been one in which Sallie E. Hillmon was plaintiff and The Mutual Life Insurance Company of New York was sole defendant;

and we submit that such bill of exceptions cannot be used or referred to in this proceeding. If that bill of exceptions purported to have been taken by any defendant in a case to which it was a party, then the question would be different, but even if it purported to have been taken by The Mutual Life Insurance Company, we submit it could not be used in this proceeding. And we claim that the Court of Appeals could not lawfully consider such bill of exceptions in considering the case in that Court.

II.

RIGHT OF CHALLENGE.

(Petition, page 4, etc.)

As shown above the two cases of Mrs. Hillmon, one against the Connecticut Mutual Life Insurance Company, the other against the Mutual Life Insurance Company of New York, were consolidated for trial; the trial judge ruled that each of the defendant insurance companies was entitled to the same number of peremptory challenges as though no consolidation had been made, namely, three each, and that the plaintiff, Mrs. Hillmon, was accordingly entitled to three challenges, because of being plaintiff in each case, that is six peremptory challenges in all.

The power of the Court to consolidate for trial *cases of a like nature* or *relative to the same question*, does not depend on whether the same person is party in the different actions.

That each party on each side of each case consolidated for trial is entitled to three peremptory challenges under Sec. 819, R. S. 1878, is, we submit, established by said case in 145 U. S. 285, 293-4—whether the *same* person is plaintiff or defendant in two or more of the cases or not is immaterial. The

plaintiff and defendant in each case is to be deemed a single party for the purpose of challenges under that section *merely* because of being such party. Sallie E. Hillmon was plaintiff in two cases consolidated. If John Doe had been plaintiff in the case against the Mutual Life Insurance Company, he would have been entitled to three such challenges as well as Sallie E. Hillmon as plaintiff in the other case; this because he would have been deemed a party for purposes of challenges under Section 819. And we submit that defendant in error was entitled to six peremptory challenges, same as two different plaintiffs would have been if some other person had been plaintiff in one of the cases; this because the plaintiff in each of the two consolidated cases was entitled to three challenges because of being plaintiff in either, making six. We submit the cases cited by plaintiff in error on this point are not at all applicable to this case. If we are not right in this contention, then it follows that under said Sections 819 and 921, the parties defendant are to be favored because of the consolidation.

Surely the cases when consolidated for trial were not merely *one* case for purposes of peremptory challenges *by the plaintiff therein only.*

They were separate for purposes of verdict, judgment, writs of error and exceptions, and also for purposes of peremptory challenges of jurymen by defendants in each case respectively.

Insurance Companies vs. Hillmon, 145 U. S. 285, 300.

Toledo, St. L. & K. C. Co. vs. Continental Trust Co., 95 Fed. 506.

From which it follows that respondent was entitled to three peremptory challenges, because of being plaintiff in each case respectively, six in all.

The ruling of the trial judge giving the plaintiff six peremptory challenges, so far as we can learn, is in accordance with the rulings of the Circuit Courts generally, since the decision in the case of Insurance Company vs. Hillmon, 145 U. S 285, but if the trial Court was in error in holding that the plaintiff was entitled to six peremptory challenges such error was harmless and no ground for reversal, because there is no complaint or ground for complaint that the jury was not a fair and impartial one.

The attention of the Court is called to the fact that the petitioner, the Connecticut Mutual Life Insurance Company, did not exercise its three peremptory challenges. (Record pages 136, 137.) It accepted the twelve men in the box when it still had the right to challenge peremptorily any juror that was unsatisfactory to it. (Record, page 137.)

After the jury were all in the box, the petitioner still had, but waived a peremptory challenge, and thereby accepted the twelve men then in the box; this was tantamount to a waiver of all objections to any thereof.

F. E. D. & W. V. Rld. Co. v. Ward, 29 Kans. 354.

There is a wide difference between overruling a challenge that a party is entitled to and sustaining a challenge that a party is not entitled to, and it is generally held that it is not substantial error to excuse a juror upon a challenge based upon insufficient grounds where an unexceptionable jury has been obtained, and especially where the complaining party has not exhausted his peremptory challenges.

Stout v. Hyatt, 13 Kans. 232, 241.
A. T. & S. F. Rld. Co. v. Franklin, 23 Kans. 74.

And the above rule has been substantially applied by this Court in the case of Hayes vs. Missouri, 120 U. S. 68, 71, where it is said:

"The accused cannot complain if he is still tried by an impartial jury; he can demand nothing more. (Northern Pacific Rld. Co. v. Herbert, 116 U. S. 642.) The right of challenge is the right to reject, not to select a juror. If, from those who remain an impartial jury is obtained the constitutional right of the accused is maintained. In this case it is not even suggested that the jury by which the accused was tried was not a competent and impartial one. He was allowed twenty peremptory challenges and it does not appear that he exhausted them."

And again in the case of Hopt v. Utah, 120 U. S. 430, it is said by this Court:

"When a challenge by a defendant in a criminal action to a juror, for bias, actual or implied, is disallowed, and the juror is thereupon peremptorily challenged by the defendant, and excused, and an impartial and competent juror is obtained in his place, no injury is done the defendant, if until the jury is completed, he has other peremptory challenges which he can use."

And in Spies vs. Illinois, 123 U. S. 131, 168, the preceding cases quoted from above were referred to and the doctrine announced therein, approved and applied.

III.

DEFENSE OF CONSPIRACY AND FRAUD.

(Petition, page 8, etc.)

In the matter of this third subdivision of said petition for *certiorari* we refer to the answer of the petitioner set forth on pages 17 to 19 of the Record.

The first ground of defense was a mere general denial of the allegations in the petition on the policy set forth at pages Record 3 to 5.

The second ground of defense at Record page 18, in legal effect merely raises the question as to whether or not a certain dead body taken from Barber County, Kansas, to Lawrence, Kansas, where it arrived on the morning of the 3d of April, 1879 (Record 756, 757), it being then seventeen days dead (Record 723, 735, 742, 743, 689, 690, 347) was or was not the body of the insured, John W. Hillmon.

We submit that the whole of the matter of pleadings, evidence and instructions relating to any claimed conspiracy was immaterial and not relevant to any material issue, and that the allegations in the answer of a conspiracy were immaterial matter. That we are correct in this, see the case of—

Union Mutual Life Ins. Co. vs. Thomas, 83 Fed. 803, 804, 805.

If the dead body brought to Lawrence in April, 1879, was the corpse of John W. Hillmon, then the insurance companies were not harmed by any conspiracy, even if there had been one. The company could not have maintained an action on account of any claimed conspiracy unless some act had been performed by some one of the alleged conspirators that in itself would give rise to a cause of action. If something had been done by a person that would serve as a basis of an action, that could be the result of a conspiracy between several persons that would extend to the injured person a right of action against all those conspirators; but with or without a conspiracy, some wrongful act is always necessary to serve as the basis of the action. Now in the case at bar, if there *was* a conspiracy, and the body *was* the

body of Hillmon, there is lacking entirely the wrongful act as against the company which could serve as the basis of an action against any person, and of course if it could not serve as a basis for an action it could not serve as a ground of defense. See—

Adler vs. Fenton, 24 Howard, 407, 410.
Findley vs. McAllister, 113 U. S. 114.
Savile vs. Roberts, 1 Ld. Raymond, 374.
Cotterell vs. Jones, 11 C. B. 713.
Shaple vs. Page, 12 Vt. 519, 533–4.
Easton vs. Patracy, 1 Dev. and Bat. 44.
Kimball vs. Herman, 34 Md. 407.
Loverty vs. Van Arsdale, 65 Penn. St. 507.
Parke vs. Huntington, 2 Gray, 124, 127–8.
Herron vs. Hughes, 25 Cal. 556.
McHenry vs. Sneer, 56 Iowa, 649.
Page vs. Parker, 40 N. H. 47, and 43 N. H. 363.
Maxwell L. G. Case, 121 U. S. 380, seven lines at bottom of page.
Robinson vs. Parks, 24 Atlantic, 411; s. c., 76 Md. 118.
Keller vs. Johnson, 11 Ind. 337.

But whether we are right in that respect or not is practically immaterial because the general allegations about fraud and conspiracy in that answer were limited to the specific fraud charged, that is, to the presentation of a dead body other than that of Hillmon, claiming it was his dead body—and amounted to nothing further than as they were so limited and referred to the specific fraud charged, which, in substance, was that the dead body claimed to be that of Hillmon was not his corpse.

Hazard vs. Griswold, 21 Fed. 178, 179, 180, and cases there cited.
U. S. vs. Atherton, 102 U. S. 372.
Quimby vs. Conlon, 104 U. S. 426.

Allegations of fraud and illegality without a statement of the facts constituting the same, are mere legal conclusions and of no force in a pleading. No issue is presented by such averments and no proof is admissible thereunder

The State of Kansas *ex rel* vs. Williams, 39 Kansas, 520, and cases there cited.

And see the cases of—

Paving Co. vs. Botsford, 56 Kansas, 541.
Gleason vs. Wilson, 48 Kansas, 500, 502.
K. P. & W. Rld. Co. vs. Quinn, 45 Kansas, 478.
Amber vs. Choteau, 107 U. S. 591 (near end of opinion), to the same effect.

And these Kansas cases show the rule to be that in Kansas Courts to the effect that there could not have been any evidence given under the said second ground of defense further than as to whether the dead body herein mentioned was that of Hillmon or not. (In effect the second ground of defense was a mere denial of the death of Hillmon.)

And that general allegations of fraud will be limited to the particulars stated, see Knox Co. vs. Harshman, 133 U. S. 155.

In view of the authorities above cited we submit it is clear that there is not in that answer any defense stated in relation to the matter of the clause in the policy shown at Record page 6, referred to on page 9 of said petition for *certiorari*, nor any pretense that Sallie E. Hillmon, the plaintiff in the suit in the trial Court, was party to or had knowledge of any pretended fraud or conspiracy.

The petitioner did not, in its answer, refer to or set up the clause in the policy mentioned on page 9 of said petition, as a defense to the action, or other-

wise allege any facts which, even if true, would have avoided the policy, as it is in the ten cases above cited shown it should have plead any such defense before it could have proved the same, and therefore we claim that the 3d and 4th subdivisions of the petition and any brief, argument or cases that may be made or cited in support of either thereof, are not pertinent to the case tried on the pleadings filed by the parties therein.

It was not in said answer alleged that defendant in error was a party to any conspiracy. (Record, 18.) And in the opening statement to the jury it was not, by plaintiff in error, claimed she was party thereto. (Record, 138.) At the trial plaintiff in error conceded it had not alleged she was, by asking leave to amend so as to allege she was, so as to introduce a new issue into a case long pending. (Record, 1619.)

The opening statement at Record 138, is, we submit, conclusive against plaintiff in error that it did not claim that defendant in error was party to any fraud or conspiracy.

Lindley vs. R. R Co., 47 Kansas, 432.
Oscanyan vs. Arms Co., 103 U. S. 261.

From this it follows that there was no allegation in the answer that would or could render the policy void or sustain any claim that the plaintiff in the trial Court was party to any fraud whatever.

If the insurance company had wished to have attempted to prove that the policy was obtained by such fraud as would render it void, it should have alleged facts in its answer which if true would have shown the policy void; failing to do so, we submit that it was not competent for it at the last trial to first attempt to make such question.

And further, the insurance company in the in-

struction No. 1, Record 1904, and No. 28, 1909, among other things requested the Court to instruct the jury to the effect that the real question in the case was whether or not John W. Hillmon died at Barber County, Kansas, on the 17th day of March, 1879, and was brought to Lawrence in April, 1879, that is, whether the dead body aforesaid was that of John W. Hillmon or not. And the Court being so requested in substance charged the jury among other things to that effect, as shown in the record at bottom of page 1917, top of page 1918, and on page 1919, and on page 1921. And after having requested the Court so to charge, the petitioner cannot now be heard to claim that the Court erred in that respect by so charging.

Walton vs. Chicago, St. P., M. & O. Ry. Co., 56 Fed. 1006, 1008, and cases therein cited.
Badget vs. Johnson-Fife Hat Co., 85 Fed. 408.

The evidence showed that the premium in said policy mentioned was paid. (Record, 145, 151, 152, 153, 752, 1505, 1506 and 1496.)

In the reply set forth at pages 20 to 22 of the record it was alleged that there was no consideration for the release plead in the third ground of defense, and that it was obtained by fraud, stating the facts.

And the evidence showing there was not any consideration for that release (Record, 773, 830, 831), and that there was not to be any (Record 580, 581), was so clear, full and uncontradicted that it was therefore the duty of the Court to instruct accordingly.

Marshall vs. Hubbard, 117 U. S. 416, 419.

And we refer to that matter of third ground of defense, release and reply, and evidence relating thereto and the matter of the premium being paid, and the admission shown on Record 201, that due

proofs of death had been made, to show that there was no controverted question left in the case at the trial except the single one as to whether the aforesaid dead body was that of John W. Hillmon or not. That was the single and only undisputed question left to be tried on the pleadings, and petitioner by requesting the Court to charge on that matter as shown in said instructions No. 1 and No. 28 (Record, 1904 and 1909), made it evident it so understood the case. And from all this we see it was proper for the Court to instruct the jury accordingly, and that the rule of law announced by the Court in that respect was correct.

And by instructing, as shown at said pages (Record, 1917, 1918, 1919), and 1921, to the effect that it was incumbent upon the plaintiff in the trial Court to show by a preponderance of the evidence that said dead body was that of John W. Hillmon, the Court not only followed the idea so claimed by petitioner as to what was material matter in issue, but correctly instructed on the issue presented by the pleadings left for determination by the jury.

And we submit there is not in the record anything, either pleading, evidence or instruction, on or because of which to raise or consider the question as to whether an insurance company can plead and prove fraud in obtaining a policy to defeat a recovery thereon, or what would constitute such fraud, and that, therefore, not only the last paragraph on page 12 of said petition, but also the other parts of said 3d subdivision of the petition, is not relevant to this case, and are without requisite foundation in either pleading or evidence.

And we submit that the same objections are good against the next or 4th subdivision of said petition set forth at pages 13 to 16 thereof.

To raise such questions as made by the 3d and 4th subdivisions of the petition or to render applicable any claim, argument, cases or brief in support thereof, we submit the petitioner should, when it filed its answer, have plead facts therein, showing it relied on the clause in the policy mentioned at page 9 of its petition, and such facts as would be necessary to make a defense thereunder—not having done so, it is now claiming and arguing with reference to questions not made by the pleadings—merely because it in effect alleged fraud only in relation to a certain dead body, whereby it merely claimed Hillmon was alive and not dead, and that the dead body of another was shown and claimed to be his, which was not an attack on the policy or its validity at all, but practically conceded the policy to be good and valid, and only raised a question as to whether Hillmon was dead or not; and even if such question affected the validity of the policy, the facts plead only went to the question of, and as to whether a certain dead body was that of Hillmon or not, which question was fully and duly submitted to the jury and the jury were instructed to find for the defendant insurance companies if said dead body was not that of Hillmon, so that all the facts stated in the answer to show fraud was fully and duly submitted to the jury. The general allegations of fraud and conspiracy made in the answer, as shown by cases above cited, did not entitle the petitioner to make proof of facts further than as to whether said dead body was that of Hillmon or not, as to which question the special facts stated were limited.

IV.

EXCLUSION OF CONSPIRACY EVIDENCE.

(Petition, page 13, etc.)

We submit that the testimony offered and excluded, which is referred to under this subdivision of the petition, was properly ruled out, because it consisted of hearsay and conclusions and did not come within the rule that declarations of alleged co-conspirators in furtherance of a conspiracy are admissible. We submit that a mere glance at the testimony ruled out is sufficient to show that it was inadmissible for any purpose, in fact, that it is not evidence at all, but mere rumor and hearsay. As has been shown, it was not alleged that the respondent was a conspirator, but petitioner attempted to introduce against her the declarations of third persons to prove that such third person and other persons were co-conspirators. The declarations of co-conspirators, to be admissible against others than the ones making them, must of course be made in furtherance of and not in frustration of the common object, and must be made during the existence of and in the prosecution of the common purpose.

The existence of the conspiracy cannot be shown by the admissions or declarations of one co-conspirator, except in so far as the admissions of each conspirator may be introduced to prove the conspiracy as to him when he is a party to the litigation. Even if *prima facie* evidence of a conspiracy had been first introduced, it is difficult to see how anything in the alleged conversations between Levi Baldwin, Crew, Dr. Phillips, Blythe and Carr, can be characterized as in furtherance of a conspiracy. If such declarations would not be competent evidence against one alleged to be a co-conspirator, for stronger reasons such declarations

would not be competent against a party not charged to be a member of such conspiracy. The rule against such declarations seems to be well stated in the case of State vs. Johnson, 40 Kans. 268, as follows:

"To make the declarations of one conspirator evidence against the others, they must be made in furtherance of the common criminal design. Mere admissions or narrations of what has taken place which have no tendency to promote a common criminal intent, are inadmissible against any one but him who made it, and when the conspiracy has ended or the crime involving the conspiracy has been consummated, the admissions of one in the absence of the other conspirators, that he and others participated in the crime, is a mere narrative of a past occurrence, and can effect only the one who makes it."

We submit that the Court did not, by giving any instruction which it gave, decide that there was sufficient evidence to prove a *prima facie* conspiracy against any one, but permitted the jury to consider any evidence on that subject so far as it would help to determine the question of identity, thus giving the petitioner the benefit of every fact that it could prove by competent evidence tending or bearing in the remotest degree upon the question of the probability of the body produced at Lawrence not being that of the insured.

And surely it was not competent to prove by conversation between Baldwin and Crew that Baldwin had previously paid part of the premiums; that would be narrative of past transactions.

40 Kansas, 268.

And also that it was not competent to prove by anything he said that he was or had been agent of respondent. Agency cannot be thus proven.

Donaldson vs. Everhart, 50 Kan. 718, 724.
Railway Co. vs. Kinman, 49 Kan. 631.

And, of course, it was not competent to prove by oral evidence that Baldwin had made such notes, mortgages or other papers as mentioned by Crew in his deposition.

Petitioner had full opportunity to cross-examine Baldwin as a witness, as shown by the record, 684 to 719; it was competent to have asked him by way of effort to impeach him as to anything he might have said to either Crew, Dr. Phillips, Blythe or Carr; and then, if he had denied, etc., plaintiff in error could have called Crew, Dr. Phillips, Blythe and Carr to prove he had said so and so, but petitioner did not choose so to do, or to allege that defendant was a co-conspirator when it filed its answer; (but if they had done so, such evidence would have gone to his credibility, and would not have been affirmative evidence against respondent of the truth of such statements.)

Further, in relation to the claim of petitioner, to the effect that the Court *held* there was a *prima facie* case of conspiracy shown—as against respondent—is rebutted by what the Court charged the jury in that part of its instructions contained in the paragraph, or subdivision thereof, partly on each of pages 1920–1921 of the record.

Petitioner and its associate insurance companies having alleged conspiracy of Hillmon, Brown and Baldwin, the trial Court (erroneously, however, we claim) permitted in evidence every act and saying of John W. Hillmon and of either John H. Brown or Levi Baldwin, done or said in the presence of John W. Hillmon, thus giving the insurance companies the widest latitude on the conspiracy question it could, giving full force to any such claim made, because Hillmon had procured the insurance; but there was no competent evidence that Baldwin paid for or procured any

of the insurance, or helped so to do. And, also, admitted such other offered evidence as it deemed competent; merely stopped at such evidence as it thought not competent under the above mentioned issues, or because of some rule of law requiring exclusion.

And further, there is not any evidence in the case that would be competent as against John W. Hillmon on any issue in any imaginable case that he was party to any such, as alleged, conspiracy. Surely, unless there was evidence competent as against Hillmon of transactions occurring before the killing on 17th March, 1879, sufficient to prove he was a conspirator as alleged, we submit the whole alleged conspiracy matter is immaterial.

V.

BROWN AFFIDAVIT.

(Petition, page 16, etc.)

John W. Hillmon, the insured, came to his death by the accidental discharge of a gun in the hands of John H. Brown. Immediately after the accident an inquest was held at which Brown testified as a witness, detailing the circumstances of the accidental killing of Hillmon; afterwards, Brown again testified at an inquest held at Lawrence, fully identifying Hillmon's body, and explaining the manner of his death. He then made and swore to the usual proofs of death that were submitted to the insurance companies by Mrs. Hillmon, the beneficiary in the policies, for the purpose of collecting them.

Almost immediately after the inquest at Lawrence the insurance companies employed a lawyer, one Buchan, who, by the most extraordinary means pursued Brown until he obtained from him an affidavit

or a statement declaring that the body was not that of Hillmon, but of one Burgess, whom he and Hillmon had lured away and killed. This affidavit is the one referred to in the fifth point of the petition for writ of *certiorari* as the "Brown Affidavit." Some of the methods by which Buchan obtained this statement, briefly stated, are as follows:

At the instance of the insurance companies Buchan went to Brown and informed him that he was his lawyer, employed for that purpose by his father; that the companies were talking about having him arrested for murder, and that he, as his lawyer, was going to keep him from having any trouble; he tried first to get Brown to make a statement at variance with his evidence, but Brown refused. Buchan then said that he couldn't help him unless Brown gave to him some sort of a paper that would show at least that Brown had confidence in him as his lawyer. He said to him in substance: "If you don't want to make any statement, let me dictate a little note, which you can write, which means nothing, but which will show to the companies that I, at least, have influence with you." And finally, at Buchan's dictation, Brown wrote a short note addressed to Mrs. Hillmon, asking where John Hillmon was. Of course this letter was never delivered to Mrs. Hillmon, but was kept in Buchan's possession until he finally turned it over to the insurance lawyers.

At this time Buchan was the agent of the insurance companies, but pretended to Brown that he was acting as his attorney. He urged Brown, who was then living in Missouri, not to come back, but to go farther away, and gave him $15.00 with a view of causing him to stay away. (Record, 474–550.) Some time after this, Buchan made another visit to Brown, but without results. A third visit was made to Brown,

Buchan being driven from Wyandotte, Kansas, to the place where Brown was living in Missouri by a deputy sheriff, whose star of authority was conspicuously displayed.

Upon arriving at Brown's house, Buchan again began upon him to make a statement contradicting his testimony, and told him that he was his lawyer and friend, and would advise him to do nothing to his detriment; that his father had employed him to help him, but that he would be unable to do it unless he did just what he was asked to do. He urged him to make a statement to the effect that the body was another's than Hillmon's, and thus satisfy the companies, and stated that if he didn't do so he couldn't keep the companies from acting any longer, and that the deputy sheriff who was with him would then and there arrest him and take him back to Kansas. Of course the Kansas sheriff had no authority with or without a warrant in Missouri, but this fact was unknown to Brown, and his ignorance in that particular was perfectly known to Buchan; and continuing, he threatened that the companies would prosecute him for murder, and in substance said "that while we know that you are innocent, yet against all their money you will be unable to prove yourself innocent, and even if you did. you will have to lay a long time in jail." Brown still refused, and finally Buchan got hold of his brother Reuben and enlisted him, and together they urged Brown to make the statement, Reuben saying to his brother, "You have known Buchan for a long time, and know him to be a friend of the family and a lawyer; and he certainly wouldn't ask you to do what wasn't right and best." And finally Brown succumbed and signed the paper prepared by Buchan, and which is known as the "Brown Affidavit." The conditions under which it was finally

made, however, were that Buchan should in nowise use it to Brown's detriment, and after using it should return it, so that it could be destroyed.

Having gotten this paper from his client, prepared by himself, making a statement absolutely false, but which, if true, proved his client to be guilty of a cold-blooded murder—a paper which, if true, both his promises to Brown and his duty to his client commanded him to keep secret—he hastened with it to the insurance lawyers and joined with one of them in preparing a certified copy thereof. He then had another interview with Brown, and in pursuance of the scheme previously arranged with the companies' attorneys and agents, he insisted on Brown going to Mrs. Hillmon, informing her of the fact that he had contradicted his testimony, and obtained for Buchan an interview with Mrs. Hillmon. In obedience to his lawyer's directions, Brown did go to Mrs. Hillmon, and said that he had made a statement contradicting his evidence, but would say no more to her than that the whole matter would be explained by Buchan if she would only see him at Leavenworth. Filled with a natural curiosity, Mrs. Hillmon went to Leavenworth, where she was met at the depot by Buchan and Brown, and was by them taken to the Planters House. Here a prolonged interview was had. Buchan explained to her that, as Brown's lawyer, he had compelled him to make this statement to avoid prosecution for murder. He explained to her the contents of the paper, and when she asked Brown how he dared make such a statement, Brown replied that he had to do it to protect himself, and that he would stick to it. Buchan then showed to her how, with the only witness who knew the actual facts against her, it was impossible for her to hope to win

her law suit against the insurance companies. (Record, 771.)

Mrs. Hillmon, at this time, while a married woman, was little more than a girl, only about twenty years of age, reared in the country, and without that knowledge of the world that comes to one with wider experience. More than that, on this occasion she was so sick that she was obliged to lie down during the day. Sick, inexperienced, believing that the abandonment of the truth by Brown meant the ruin of her cause, she finally yielded and signed the releases.

When actions were subsequently instituted upon the policies, these releases were pleaded as a defense to the actions, and it became necessary in order to defeat the releases to show the circumstances under which they were obtained, which could only be done by putting the jury in possession of the facts with reference to the use that was made of this false affidavit of Brown's. After the making of this affidavit, and the institution of the actions upon the policies by Mrs. Hillmon, she gave notice to the insurance companies and took the deposition of Brown. In this deposition he reiterated what he had testified to at the coroner's inquest, and described in detail the accidental killing of Hillmon. He was subjected to a most thorough and searching cross-examination by the attorneys for the insurance companies; he was confronted with the fact that he had made this affidavit, but utterly denied the truth of the same, and explained the manner in which it had been obtained from him. This deposition was introduced in evidence by the plaintiff, and the contents of the affidavit which was brought into and became a part of the deposition by the cross-examination, was in effect put before the jury. It is true the affidavit was read to the jury by the plaintiff,

but it was well understood to be the evidence of the defendant. The trial judge evidently so understood it, and in the excerpt from the general charge of the Court, which is set out on page 17 of the petition for *certiorari*, the Court so treated it, saying:

"The deposition of John H. Brown was read to you *on behalf of the plaintiff.*

"*On behalf of the defendants*, evidence was introduced tending to show that he made oral declarations to W. J. Buchan, and showing that he also signed and swore to a statement contrary to his testimony given before you."

Any statement of the Court in this instruction, that this affidavit was evidence *on behalf of the defendants*, was not excepted to in any way by the counsel for the insurance companies. Clearly, if the counsel for the insurance companies understood or believed this characterization of the affidavit of John Brown, as evidence on behalf of defendants, to be erroneous and to have resulted from inadvertence or misapprehension of the judge, they should then and there have excepted and called attention to the error that the trial judge might have corrected it.

In any event, whether the affidavit of John H. Brown is to be treated as the evidence of the plaintiff or as the evidence of the defendant, we contend that the instruction of the Court correctly states the law applicable to this case, and, especially in the absence of any exception by the insurance companies, they ought not to be heard to complain of the same.

In some form it was necessary that the contents of this affidavit should be made known to the jury to enable the plaintiff to show the manner and means by which the plaintiff was induced to execute the releases.

The claim that the plaintiff, in reading this affi-

davit, was understood by the insurance companies, the Court or the jury, to introduce the same as evidence of truth of the facts therein stated, is in conflict with the entire theory of the case. The exact reverse was true and was so understood by all concerned. It was contended at all times by the plaintiff that this affidavit was false; that the insurance companies had corrupted the plaintiff's witness; that by obtaining this false affidavit and other means, the plaintiff had been fraudulently induced to sign the releases without any consideration. As said by Judge Thayer in the opinion (petition for writ of *certiorari*, page 43) of the Court of Appeals:

"There was evidence in the case which tended to show that the *ex-parte* statement had been obtained from Brown on September 4, 1879, by much persuasion and by covert threats; and by some unprofessional conduct on the part of the attorney who had obtained it; and that it had been used to induce the plaintiff to release her cause of action on the policies in suit without consideration; on the other hand, Brown's deposition had been taken at a later date in the usual way, and he had been cross-examined by the defendant company at great length. In his deposition he admitted having made the statement, and asserted that the statements therein contained, to the effect that Hillmon was not dead and that another man had been killed, were each false. He also explained the reasons and the influences which had been brought to bear upon him to induce him to make the false statement. It was the province of the jury to decide in view of the circumstances tending to show how the *ex-parte* statement had been obtained and the use that had been made of the same, and in view of the fact that it had been introduced into the case by the plaintiff, not as creditable testimony, but merely for the purpose of discrediting it, whether they would treat it with '*like effect*,' or consider it as entitled to the same credence as Brown's deposition."

In the dissenting opinion of Judge Sanborn (petition for *certiorari*, page 49), it is said:

"Forms and rules are prescribed by statutes and decisions for the taking and production of testimony which give the opposing party the opportunity and right of cross-examination, and the security of an oath. But this opportunity, this right and this security may be waived by stipulation for, consent to, or silent acquiescence in the introduction of testimony, and when this is done the statement admitted becomes as competent evidence of the facts it details as though every formality had been complied with. Much more does the offer and introduction of this evidence have such effect, for he who introduces testimony is, ordinarily, in some sense sponsor for its character. The plaintiff introduced this affidavit in evidence, and the defendants consented to its admission. The plaintiff was thereby estopped from claiming that it was not evidence of the facts it recited, because the defendant relied, and had the right to rely, upon it for that purpose, and because the plaintiff having introduced it, was not permitted to take the inconsistent position that it was not competent evidence of the facts it related."

Now we respectfully submit from an examination of the circumstances under which this affidavit was read to the jury, whether it would not be a most violent and unreasonable construction of the conduct of the parties, their counsel and the trial judge, to say that the plaintiff intended to introduce this affidavit as evidence of the truth of its contents, or to say that the defendant had reason to suppose or believe that the plaintiff so intended it or had any right to "rely" or did "rely" upon any such supposition, and whether the trial Court in view of its instructions and all of its rulings, believed or supposed at the time said affidavit was read that the plaintiff intended to introduce it for any such purpose, or that the defendants under-

stood that the plaintiff so introduced it, or had any right to rely upon any such supposition.

The insurance companies at all times understood, and the trial judge at all times understood, that the plaintiff claimed that this affidavit was wholly and absolutely false and corrupt and was obtained by fraud for the purpose of using it to extort the releases from Mrs. Hillmon. To say now that the insurance companies relied upon the belief that the plaintiff introduced the affidavit for the purpose of proving the truth of its contents or to prove the contents thereof to be true, we submit is absurd, and would give the insurance companies the advantage of a mere technicality in that when this affidavit was read the plaintiff did not expressly state that it was introduced for a limited purpose, although the defendant and the Court both so understood it.

The deposition of Brown commences at page 342 of the record, and therein John H. Brown testified to the effect that he accidentally killed Hillmon in Barber County, in March, 1879, and further testifies to the effect that said affidavit was obtained from him by duress and because of undue influence of a person acting as his attorney, really the agent of the insurance companies, by which undue influence he was induced to sign a false statement and swear to it before a notary public, such agent and pretended attorney representing to him to the effect (as stated in that part of the instruction of the Court quoted at page 18 of the petition for *certiorari*) among other things, that the affidavit was unlawful, could not be used against him, in substance that it was not prejury to so swear to such facts, and using other influences and arguments to obtain the affidavit, as shown by that deposition.

Now as a matter of law, it is clear that Brown

could not be prosecuted for perjury for making that affidavit, it being utterly false, because it was not made in any legal proceeding or in any proceeding in which a false statement would subject a party to the pains and penalties of perjury—and the whole case was tried on the theory and claim on the part of the plaintiff in the trial Court, that that affidavit was false and untrue, and that because thereof influence had been obtained by Buchan over Brown, because of which he secured Brown's assistance in getting her to sign the releases plead, and that it was a part of the matters because of which she had been induced to sign the releases. Surely a party may prove all the frauds and fraudulent practices, means and statements used in and against a party and others by means of which a wrong is done, and that so doing would not admit the truth of the false statements used to obtain a release or other paper from them. If this is not so, how can any fraud, fraudulent allegation or false statement be proven or shown in any case? A forged deed is introduced in evidence to show that it was a forgery; false and fraudulent pretenses are proven to show what operated to induce a person to do an act of which complaint is made. Plaintiff by abundant evidence proved that the affidavit was false.

The affidavit states that the person killed by Hillmon and Brown was one Burgess, yet the evidence is clear that Burgess was not killed, but was afterwards seen alive. (Record, 903–6–8.) If the instruction asked, that the affidavit is to be given like effect as the deposition, was correct, then the jury were authorized to believe that Hillmon and Brown murdered Burgess, although the uncontradicted testimony is that Burgess was not murdered at all, and this by the testimony of one of the insurance companies' witnesses. (Record, 903–6–8.)

Buchan knew the affidavit to be false. (Record, 472–475.)

But if the *ex-parte* affidavit of John H. Brown, in the language of said 44th special instruction, is to be treated "as evidence of the facts therein stated under oath, against the plaintiff," still said 44th special instruction is vicious and misleading and invades the province of the jury, in this that said *ex-parte* affidavit of Brown's is wholly and irreconcilably in conflict with the deposition of said Brown upon the same subject, and the instruction which required the jury to treat said affidavit "with like effect as the deposition," eliminates and withdraws from the consideration of the jury all of the numerous tests, including cross-examination arising from the evidence, and proper to be applied by the jury in determining which of said two items of irreconcilable evidence it would believe.

We submit that it was the province of the jury alone, having both the affidavit and the deposition before them, to utterly discredit both and give neither any weight at all either for or against the plaintiff or defendants, or they were at liberty to believe that the *ex-parte* affidavit was obtained under duress and by means described in the deposition and in the other testimony, and that the influences and duress having been removed that Brown in giving his deposition had finally told the truth. The jury could not believe both the *ex-parte* affidavit and the deposition because they cannot be reconciled, and if the affidavit was to be treated as evidence as well as the deposition, it was the exclusive province of the jury to say what weight should be given to either or both of these items of evidence, and it was not proper for the Court to say that the affidavit should be treated "with like effect as the deposition."

It is complained under this head that Judge Thayer incidentally remarked, in the opinion in the Court of Appeals, that no exception had been taken to the charge of the Court upon this subject, and that, therefore, the Court of Appeals was relieved of the necessity of deciding whether there was anything misleading in the excerpt referred to. The case of Long Bell Lumber Company v. Stump, 86 Fed. 574, is referred to as holding that no exception to the charge is necessary where a special instruction asked embodying the same principle has been refused and excepted to. We respectfully submit, however, that the general charge of the Court upon this subject is very far from being a mere denial of the proposition contained in said 44th special instruction asked, and that under no circumstances could said 44th special instruction have been given without the clearest invasion of the province of the jury. In this connection we also submit that no proper exception was ever taken to the refusal to give said 44th special instruction. After the Court had charged the jury in this case, one of the counsel for the insurance companies made the following remarks: "We except to what you say on the subject of conspiracy." "We except to the refusal to give the instructions which we requested." (Record, 1926.)

This was all the exception that was taken either to the charge given or the special instructions requested and refused, as clearly appears upon page 1926 of the record. The general charge of the Court contained several distinct propositions upon the subject of conspiracy, some of which are not now complained of and certainly were unexceptional. The special instructions requested consisted of a series of forty-eight different propositions, some of which were inconsistent with others. It is true that when the

bill of exceptions was signed some months later, a separate exception was inserted after each one of the special instructions, but the record, at page 1926, clearly shows what was said by counsel at the close of the charge of the Court, and contains the following recital, namely: "This (referring to the above quoted words) was all that was said by counsel upon the subject of exceptions to the instructions requested and charges given."

Now we submit that no such general exception to the entire series of forty-eight special instructions and the entire charge of the Court upon the subject of conspiracy was of any validity, and that it was beyond the power of the judge who signed the bill of exceptions to enlarge the same four months after the trial was had.

Rogers vs. The Marshal, 1 Wall, 644.
Harvey vs. Tyler, 2 Wall, 328.
Block vs. Darling, 140 U. S. 238.
Bogk vs. Gassert, 149 U. S. 17.
Newport M. & M. V. Co. vs. Pace, 158 U. S. 36.
Railway Company vs. Callaghan, 161 U. S. 91.
Halloway vs. Dunham, 170 U. S. 615.

There was abundant evidence, independent of any of the testimony of Brown, that the dead body mentioned was that of Hillmon. The case did not at all necessarily turn on his testimony, and we submit that with reference to anything said or done by John H. Brown, that his affidavit so far as the case related to the identification of the dead body was only matter of impeachment as to whether he was a credible witness on the question of identity of the dead body, and was not evidence and could not be made evidence for any other purpose in relation to the matter as to who the dead man was, whether Hillmon or another, no matter which party read it.

FURTHER AS TO THE BROWN AFFIDAVIT AND ALSO AS TO THE RELEASE PLEADED.

If in any brief or argument that has been or may be filed herein for the petitioner for a writ of *certiorari* reference shall be made to any of the testimony of William J. Buchan, relating to either the affidavit of Brown or the release, then for this Court to understand how the questions and matters relating to that affidavit and the release respectively arose and appeared and were presented at the trial to the trial Court, it will be necessary for this Court to read, among other, the following parts of the record, to-wit: The deposition of John H. Brown, commencing at page 342 (except the parts not read, as shown at pages 339, 340, 341), particularly pages 436, 437, 457, 458, 459, 472 to 477, 482 to 484, 493 to 519.

And the testimony of Reuben Brown, commencing at page 544.

And testimony of Sallie E. Smith (formerly Sallie E. Hillmon, the plaintiff), at pages 766 to 779, 795, 796, 816 to 830, 1892, 1893, 1898 to 1900.

And testimony of James W. Green, at pages 575 to 597, 1901 to 1904.

And testimony of William J. Buchan, a witness called by the insurance companies, and on and really as part of his cross-examination that affidavit was read after he had testified on examination in chief for the insurance companies, as shown at pages 1227 to 1250. Also to read page 1269 where he shows he took pen, ink and paper with him to write the affidavit, after he had been employed and urged to procure the same for the insurance companies, as shown at pages 1246, 1247, 1250 to 1269.

At pages 1247, 1248, 1250, 1251, 1288, it is shown

Buchan was paid $500.00 and expenses by the insurance companies for what he did. (See also pages 1277 to 1288.)

The evidence of Buchan conflicts with that of Reuben and John H. Brown and Mrs. Smith. But from his and their testimony it is, we submit, clear beyond question that Buchan was in the employ of and acted in the matter for the insurance companies, including the petitioner from some time in April, 1879 (Record, 1250, 1251), until and after he obtained the releases, employed to ruin the character of John H. Brown for truth and veracity by procuring that affidavit, and also to obtain the releases; we submit that by any reading of said affidavit on such cross-examination, which of course was done as part of the cross-examination of William J. Buchan, not only for the purpose of showing all the facts and circumstances relating to that affidavit and as to how the releases were obtained, concerning both of which, so as to make such cross-examination proper, he had testified for and as a witness of the insurance companies on his examination in chief, but also to affect and destroy the credibility of William J. Buchan as a witness because of his obtaining such affidavit written by himself (Record, 1284), and making such use as he did thereof, on his own showing, and more so if he obtained it as shown by Reuben and John H. Brown, particularly so as to the matters in which he conflicted with any other witness in relation thereto. By procuring and making such use of that affidavit and the letter by him obtained from Brown, shown in evidence, he put John H. Brown in serious peril and great danger of prosecution for murder. For Buchan to have done that when acting as attorney for Brown, as shown by the cited evidence, Buchan, of course, did that which, as such attorney, he should not have

done no matter what the facts were in relation to the killing. But no matter what he should have done, his credibility was affected by his procuring and making such use as he did of that letter and affidavit.

And we submit that by such reading of the affidavit on such cross-examination, the respondent did not either become responsible therefor, or represent it stated any truth. And by so causing the affidavit to be so procured and used, surely the insurance companies, including the petitioner, became responsible therefor as their paper, statement or affidavit prepared by Buchan and signed by Brown as their agents and representatives to injure the respondent, and of course they are not entitled to have respondent held to have represented the affidavit was true because of so reading it under the circumstances shown by the record.

And further, the testimony of William J. Buchan being irreconcilably in conflict with that of Reuben and John H. Brown in relation to the manner in which that affidavit was obtained, and as to whose the statements therein made really were, that is, as to whether the affidavit was, as we claim, the invention of Buchan as the representative of the insurance companies and therefore the act and invention of the petitioner, or was the invention of John H. Brown, that was, of course, an important matter for consideration by the jury. And it was also material whether the statements as to what John H. Brown told Buchan, as testified to by Buchan in his examination in chief, was true, or whether the testimony of John H. Brown and Reuben Brown on the same subject were true—as to which told the truth in relation to those matters was exclusively the province of the jury to determine—the Court would have invaded that province if it had given the 44th instruction

asked, and therefore we submit it was properly refused as well as for other reasons.

VI.

IMPEACHMENT OF THE RELEASE.

(Petition, page 22, etc.)

The insurance companies respectively set up in their answers certain written releases alleged to have been executed by Mrs. Hillmon on Sept. 15th, 1879. In the replies in this case it was alleged that the release was obtained by fraud and without consideration. (Record 20-22.) The insurance company did not demur to or in any other manner question the right of the plaintiff to so attack the release in the action at law, and no objection on the trial was made to the introduction of evidence in support of the replication on the ground that the release could not thus be proved in any action at law, or that a suit in equity was necessary to set it aside. It is, however, after verdict on a proceeding in error, for the first time claimed by the petitioner that the release is to be treated as an instrument under seal, and that it was not competent for a court of law to deal with it, but that recourse should have been had to equity. In answer to this contention, we claim that if such a question could be raised at all, it must have been done by demurrer to the reply or by some seasonable appropriate objection, and cannot be done after verdict and after twenty years of litigation, and after a suit in equity to set aside and vacate the release would be barred by limitation. In the case of Union Pacific Ry. Co. vs. Harris, 63 Fed. 800, a similar question was raised, and the Court of Appeals, overruling on the point, said:

"The chief contention of the plaintiff in error is that the issues arising on the replication to the defendant's supplemental answer should not have been submitted to the jury. It is said the plaintiff cannot in this action avoid the release for fraud, or show that he was mentally incapable of entering into a valid contract at the time he executed it; that the release can only be avoided upon these grounds by a suit in equity. This question was not raised in the lower Court. The defendant did not demur to either of the causes of reply, or move to strike the same out of the reply, but acquiesced in the issues presented, and went to trial thereon, thus conceding that the court could try the issues presented. These issues were tried to the jury without objection, and it is now too late to object for the first time in the Appellate Court to that mode of trial. The objection that an action should have been brought at law instead of in equity, or *vice versa*, is waived by a failure to interpose it at the proper time in the court of original jurisdiction. (Hollins vs. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127; Insley vs. U. S., 150 U. S. 512, 14 Sup. Ct. 158; Preteca vs Land Grant Co., 50 Fed. 674, 1 C. C. A. 607, 4 U. S. App. 326; Tyler vs. Savage, 143 U. S. 79, 12 Sup. Ct. 340; Reynes vs. Dumont, 130 U. S. 354, 395, 9 Sup. Ct. 486.) If a party, when sued at law, conceives that the action, or any material issue in it, is of equitable cognizance, he must interpose the objection at the threshold of the case, and will not be heard to make it for the first time in the Appellate Court. The general principle is now well established that an appellate court will not entertain an objection to the form of the action, when the objection was not interposed in apt time in the trial Court. It will be presumed that the parties assented to the theory that the remedy adopted was the proper one, and they will be held to that theory on appeal. Moreover, it is a general rule that questions not presented to the trial Court will be deemed waived. (Elliott, App. Proc. Secs. 658, 679, 690, and citations; Brown v. Lawler, 21 Minn 327; Brown v. Nagel, id. 415; Weaver v. Kintzley, 58 Iowa, 191, 12 N. W. 262; Town of Mentz v. Cook, 108 N. Y. 504,

15 N. E. 541; Buffalo Stone & Cement Co v. Delaware, L. & W. R. Co. (N. Y. App.), 29 N. E. 121; Sexton v. Pike, 13 Ark. 193; Creely v. Brick Co. 103 Mass. 514.) In what is here said, we are not to be understood as intimating that, if the defendant had interposed a timely objection to the jurisdiction of the lower Court to try the issues presented by the replication, the objection would have been of any avail."

The decisions of this Court, cited by the Court of Appeals in the above case, fully sustain the principle of the decision and are conclusive upon the point that such objection must be taken *in limine* or it will be waived.

But furthermore there was no exception taken in the trial Court that presents any such question for review; to some of the testimony offered by the plaintiff in support of the reply, the objection that the offered testimony was "incompetent, irrelevant and immaterial" was made. No other objection was offered. The testimony to the effect that the release was obtained without consideration was uncontradicted, and free from conflict, and upon the close of the case the Court eliminated the release as such, wholly from consideration by the jury, by instructing as follows:

"As to the releases executed by the plaintiff and set up in the answers of the defendants. While under the law the execution of the written instruments of releases by the plaintiff imports a consideration therefor, nevertheless the undisputed evidence in this case shows that the said releases were wholly without consideration and therefore they are inoperative as releases, and do not constitute a valid defense, and the plaintiff did not, by any of them, release or discharge any cause of action or any other right that she may have had, etc." (Record, 1921–1922.)

The insurance companies at the trial acquiesced in this action of the Court by taking no exception of any kind to this instruction. The only exception taken at any time by the insurance companies or either thereof to the general instructions of the Court, was in the following language:

"We except to what you say on the subject of conspiracy." (Record, page 1926.)

That such an exception was not sufficient to raise any question as to the exclusion by the Court of the release to the petitioner from consideration by the jury, as such release is, we submit, too plain to require further observation. The Court did not exclude the releases so far as they might operate against the plaintiff in determining other questions.

And further, for additional reasons, independent of the above, we claim it was competent to defeat the releases in the manner done, because at common law it would have been necessary for the insurance company to have pleaded and proved a consideration therefor.

1 Chitty on Pl. (16 Am. Ed.) 300, (382, bottom paging.)
4 Enc. Pl. & Pr. 928, 929.

This, because the release pleaded by the respective companies were not any of them under seal. (As to the one pleaded by the petitioner, see page 19 of the record and page 22 of the petition.)

Sections 6, 7 and 8 of the 21st Chapter of the General Statutes of Kansas, set forth at pages 23 and 24 of said petition, taken together and considered as applicable to this case, merely change the burden of allegation and proof with reference to the matter of consideration of the release.

The statute did not affect the common law in relation to matters of fraud. The statute has no bearing upon the question as to the manner of proving or pleading fraud in the obtaining of a written instrument.

That the want of consideration and fraud, alleged in said reply, could be plead against said release without any previous recision of the release, see—

Railway Co. vs. Goodholm, 61 Kansas, 758, 761 to 766, the pleadings in which case are described at id. 759.

Railroad Company vs. Doyle, 18 Kansas, 59, 62.

Union Pacific Ry. Co vs. Harris, 63 Fed. 800 to 804.

Silk vs. M. R. L. F. A., 28 Atlantic, 445.

Berry vs. A. C. Ins. Co., 39 N. E. 254; s. c., 132 N. Y. 49.

Platt vs. Continental Ins. Co., 19 Atlantic, 637, 638; s. c., 62 Vt. 166.

And see also the following additional cases which, with the six last above named cases, are also cited in support of our contention that plaintiff in error took the release, subject and liable to be defeated, because of the fraud and want of consideration therefor stated in the reply.

Atlantic Cotton Mills vs. Indian Orchard Mills, 17 N. E. 496, 501; s. c., 147 Mass. 268.

De Souchet vs. Dutcher, 15 N. E. 460; s. c., 113 Ind. 249.

Crain vs. Hunter, 28 N. Y. 389.

Lawrence vs. Hand, 23 Miss. 103, 105.

Bower vs. Johnson, 10 S. and M. 169, 173.

V. S. M. Co. vs. Rheinschild, 25 Kansas, 537.

Fitzsimmons vs. Joslyn, 52 Am. Decs. 46; s. c., 21 Vt. 129.

Union Trust Co. vs. Phillips, 63 N. W. 903.

Albitz vs. M. & P. Ry. Co., 42 N. W. 394.
Michigan M. L. Ins. Co. vs. Naugle, 29 N. E. 393.
Fairchild vs. McMahan, 34 N. E. 779; s. c., 139 N. Y. 290.

Those three sections of the Kansas Statutes, as construed in the above cited cases in the 18th and 61st Kansas, merely have effect to change the burden of proof and render it necessary for the party desiring to defeat such an instrument for want of consideration, to plead the same; that is, the want of consideration, and on the person pleading rests the burden of proof to show the want of consideration.

By its second cause of reply respondent pleaded such want of consideration. (Record, 20, 21, 22.)

There is certain particular evidence especially applicable to and fully showing that there was not any consideration for the release set forth at record, pages 773, 830 and 831, and more showing that there was not to be, set forth at page 581.

The testimony referred to at page 23 of said petition (Record, 576, etc.), had application to the matter of the Brown affidavit before mentioned, and also to the attempt to be made to procure the releases, and was applicable to both the want of consideration and fraud pleaded to defeat the release. In this connection we refer also to pages 582 to 586 of the record.

It will be seen from the evidence at pages 576–578, that it was necessary for Munn, the agent of the insurance companies, to give Buchan the paper set forth at Record 580, signed by Munn in behalf of the companies to get Buchan to proceed in the matter of attempting to obtain the releases pleaded.

We do not suppose it is necessary to refer to more of the evidence on the subject of fraud or want of consideration, because we do not understand

the petitioner to be making any claim that the evidence was not sufficient to show as matter of law such failure of consideration for the release as would as a matter of law defeat it, within the rule relating to instructions laid down in the case of Marshall vs. Hubbard, 117 U. S. 416, 419.

If those three cited sections of the Kansas Statutes had not been enacted, respondent could, without question, have defeated the releases for want of consideration, as well as because of the fraud alleged, and have pleaded and proved the same in the Federal Courts as at common law. And those three sections, taken together, did not deprive respondent of any such right to so defeat any such release.

And we submit that the construction of those three sections claimed by the petitioner is directly contrary thereto and to the object thereof, and that those sections of the statute do not have effect to make the release a sealed instrument; to hold they do would be squarely in the face of and in opposition to the sixth section.

It is always competent at common law in the Federal Courts to plead want of consideration to bills of exchange, promissory notes, and all other written instruments, not under seal, irrespective of any statutes similar to the sections cited.

About noon of the 9th inst., after our brief, as before prepared, was in the hands of the printer, we received copies of the brief for petitioner too late to duly consider or prepare answer thereto and get our brief prepared, taken to Washington and filed on the 13th inst., but we make such answer to parts of what is on pages 39 and 35 thereof as follows:

With relation to the claim at page 39 of petitioner's brief to the effect that a statute of Kansas cannot confer upon the Courts of the United States power to

entertain equitable defenses in an action at law, we submit such claim is not applicable to *this case* nor are the authorities cited in support thereof, because as above stated, at common law the defense of no consideration and fraud could have been plead against the release set up in the answer, it not being under seal.

And the sections of the Kansas statute cited at pages 23 and 24 of the petition, particularly Section 8, surely in effect continued that rule of common law in force as to all courts and cases.

As to the release relied on the common law in relation to the want of consideration for such an instrument was not by the three sections cited or by any other law of Kansas in any manner affected, repealed or annulled. If those sections of law had not been enacted respondent could have plead the want of consideration and fraud thereto in an action at law in the Federal Court, (not only so, but petitioner would have in its plea of release been required to show a consideration therefor). As such would have been the situation if those sections had not been enacted, surely the enacting thereof by which, among other things, the common law rule of right to defend against such releases is expressly continued as shown by Section 8, by giving right to plead such defense. Any claim that the Kansas Statute has attempted to confer equitable jurisdiction in a law case upon Courts of the United States is not applicable to this case. But even if we are wrong in that respect, then as shown in the case above cited in 63 Federal, 800–803, and the cases therein cited, the respondent waived any objection to the want of consideration or fraud being plead and proved as a defense to the release by not demurring to the reply when filed in January, 1883 (Record, 22), before any trial.

Of course, because of the Section 7 cited, it was incumbent on the respondent to attack the release, which she successfully did by uncontradicted evidence; not only was want of consideration shown by the evidence introduced by herself, but the testimony of the insurance company in relation to the procuration of that release showed it was without consideration.

In relation to the claim made on page 35 of the petitioner's brief, to the effect that the plaintiff, the respondent, on the 15th of September, 1879, the day on which the release plead by petitioner was made (Record 19), went with the release herself to the office of her counsel, we submit that there is not any evidence whatever to show or indicate in any manner that she either had or showed or mentioned the releases to or at the office of her counsel there mentioned in September, 1879. Any claim that she so had the releases or any thereof there, is without any foundation whatever in the evidence; and there is not any evidence that respondent either ratified or confirmed the release to the petitioner, and the circumstances shown by evidence in her behalf under which she executed the same shows she did not execute the same upon full or any deliberation on her part.

In reference to what is so said at page 35 of said brief about the releases, we refer to the following testimony, to wit:

The exhibit 16, the release to the Mutual Life Insurance Company, and exhibit 17, the release to plaintiff in error, both dated at Leavenworth, on the 15th of September, 1879, and copied at record 585, and the exhibit 19, an order for the policies of same date, copied at record 596, which are the exhibits 16, 17 and 19 referred to at record 773, 823, as having

been signed by defendant in error without reading or knowing the contents thereof. And when she was sick. (Record, 771-2-3, 821) Signed because Buchan told her to. (Record, 772, 823.) At the Planters Hotel where and when only Buchan and respondent and perhaps Brown were present. (Record, 822.) After which signing, respondent testified they went to the office referred to at said page 82. (Record, 822 774.) But Buchan testified that the releases were signed *after they went to that* office. (Record, 1241, 1242.) But both of them show by their testimony that the releases were not shown or mentioned at that office or to Wheat (Record, 774, 822, 823, 1241, 1242.) And the same last referred to pages show there was not any such opportunity for her to say anything to Wheat about the releases, as one having either signed the releases or demanding the policies would avail themselves of; and what Buchan afterwards induced her to do in staying away from Lawrence (Record, 774 to 778) and elsewhere, proves Buchan intended to keep her from informing any of her attorneys of her having signed any release or of any intention to deliver the policies. It will be noticed that although when she demanded the policies, Wheat asked what it meant, she did not explain. For all of anything said at the office of Clough & Wheat, she might have intended to employ Buchan to prosecute her claim on the policies. Nothing was said to Wheat to the contrary, or to indicate she had or intended to abandon her claims on the policies. All they let him know was that she wanted Wheat to let her have the policies she had before (in May, 1879) delivered to him. And there is not any evidence tending to show that anything was said at that office or to Wheat or any counsel of respondent at that time or until months

afterwards, about any release or order for the policies. From all which and the other evidence elsewhere herein cited, it is evident that the statements in said brief at said page 35 about *full deliberation*, respondent going with them (*meaning the releases*) *herself to the office of her counsel*, etc., is not only not sustained by evidence, but is contrary to the actual facts.

The record, referred to at page 35 of said brief, relates to the execution of a release, marked exhibit 24, to another company than the petitioner, and was executed ten days after the release in controversy in this case. It was a second release to the New York Life, and was executed while Mrs. Hillmon was still under the influence of Buchan, and was made at Wyandotte, and has no bearing upon this case, the New York Life Company having settled. And that also was shown to be without consideration (Record, 830, 831), yet that is not material in this case.

VII.

LAPSE OF TIME AS EVIDENCE.

(Petition, page 26, etc.)

At the time of the trial, more than twenty years had elapsed since the production at Lawrence of the dead body identified by his wife and many other witnesses as that of Hillmon. During all that time, notwithstanding the claim made by the insurance companies that he was still living, and the extraordinary efforts made by them to find him, the wide notoriety of his disappearance and of the litigation based upon his alleged death, Hillmon had never been seen or the slightest trace of him obtained. These facts

being before the jury the insurance companies requested the Court to instruct the jury that the length of time since Hillmon disappeared "is an immaterial matter in this case." (Record, page 1909.) The Court declined to give the requested instruction, but in substance charged that the jury were at liberty "to consider the fact, if it be one, that he has not been seen or heard from alive since the 17th or 18th of March, 1879, at which time it is claimed he was killed." (Record, 19 and 20.)

In the same connection the Court cautioned the jury that if the evidence disclosed that any motive existed for his absence, such motive should be given due consideration in determining what weight, if any, should be given to such continued absence. The insurance companies complain of this part of the Court's instruction, but no exception of any kind was taken by them thereto at the trial. The refused instruction No. 28, (Record. page 1909), after asserting that the lapse of time "is an immaterial matter," also asserts that "the real question in this case is whether or not John W. Hillmon died at the time and in the manner" alleged in the petition. The Court, as requested by the insurance companies in this 28th special instruction, distinctly charged the jury to the effect that the crucial question in the case was whether John W. Hillmon died in March, 1879, and whether it was his body that was brought to Lawrence in April of that year, and that unless the plaintiff established the identity of said body by a preponderance of the evidence, the jury should find for the insurance companies (Record, 1917, 1918, 1919 and 1921), so that the substance of the 28th instruction was given, except the Court declined to say that the lapse of time was an immaterial matter.

We submit that the lapse of time was not entirely an immaterial matter, but was proper to be considered by the jury upon the question as to whether the body produced at Lawrence was that of the insured. That the instruction as given by the Court was correct, is show by the cases of—

Davie vs. Briggs, 97 U. S. 628, 634, 636.
Whitely vs. E. L. A. Soc. of U. S., 39 N. W., 369, and cases therein cited.
1st Greenleaf on Evidence, Sec. 41, and notes.

CONCLUSION.

The attention of the Court is respectfully directed to the fact that the amount involved in this case originally was only $5,000; the litigation has been pending more than twenty years; it has been tried before six judges; two verdicts have been found in favor of the plaintiff and approved by the presiding trial judge; the last trial consumed nearly five weeks, and one or two preceding ones have consumed a longer time; three of the judges who tried this case, some of the counsel engaged, and many of the witnesses have died. The record in the Court of Appeals contains 2,007 pages; the case in that Court was fully and elaborately argued, the insurance companies being represented by six different able counsel, and voluminous briefs were filed.

And we submit there is not involved in this case any such question of gravity or importance as to make it appropriate for this Court, in the exercise of its discretionary power, to grant the writ of *certiorari* asked for by the petitioner for the purpose of bringing before this Court the 2,007 pages of printed

matter, including the 108 assignments of error for argument in this Court, which constitutes the record in the case, at a cost of from three to four thousand dollars to the parties. And we ask that the Court refuse the writ of *certiorari* asked for.

Respectfully submitted,

C. F. HUTCHINGS,
JOHN H. ATWOOD,
L. B. WHEAT,
Attorneys for Respondent.

May 10, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Petitioner.
vs.
SALLIE E. HILLMON,
Respondent.
No. 316.

OBJECTIONS TO MOTION OF PETITIONER.

And now comes Sallie E. Smith, formerly Sallie E. Hillmon, the respondent in this, the above entitled proceeding, and objects to the Court sustaining the motion of the above named petitioner herein, whereby it in substance asks this Court for an order that that printed volume containing 2007 pages of printed matter heretofore filed herein be taken and stand as a due return to the writ of *certiorari* heretofore issued herein for the following reasons among others which may suggest themselves to the Court, to-wit:

First. Because said printed volume does not purport to contain a full, correct or sufficient copy of the

record, proceedings, bills of exceptions and other necessary papers of or in the case of Sallie E. Hillmon vs. the Connecticut Mutual Life Insurance Company, of Hartford, Connecticut, in the Circuit Court of the United States for the District of Kansas, Case No. 3149 in that Court. The part of said printed volume which precedes the figure or side-paging 1, on page 3 of that volume, purports to be a copy of a citation to respondent, and of a writ of error requiring the clerk of the Circuit Court of the United States for the District of Kansas to have the record and proceedings in the above named Case No. 3149, filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit on or before the 11th of July, 1900, etc., in usual form for a writ of error and citation in such matter, followed by a statement on page 3 of said printed volume of the clerk of the Circuit Court for the District of Kansas, dated of the 20th of June, 1900, to the effect that he with said writ transmitted to said Court of Appeals a certified copy of the record and proceedings in that case with all things concerning the same, but by his certificate thereto set forth on said page 2007, he shows that he did not transmit with that writ of error any copy of a certain bill of exceptions, meaning, of course, of a bill of exceptions in that Case No. 3149.

By reference to pages 129 and 1927 of that printed volume, it will be seen that the 1798 pages thereof, commencing at the figures 221 on said page 129 and extending to the figures 206 on page 1927 of that printed volume, purports on its face to be a copy of a bill of exceptions taken in said Circuit Court for the District of Kansas in another case, to-wit: in Case No. 3147, wherein Sallie E. Hillmon was plaintiff and The Mutual Life Insurance Company of New York was the sole and only defendant, and that the

same was taken in such other case by The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, which last named company was not party in that Case No. 3147.

The affidavit of John D. Jordan, clerk of said Court of Appeals, filed herein, shows that the part of said printed volume commencing at said figures 221 on said page 129 and extending to said figures 206 on said page 1927, was not included or set forth in the transcript so transmitted by the clerk of said Circuit Court for the District of Kansas, and it, that affidavit, further shows that the transcript so transmitted consisted only of said citation and writ of error and of 304 typewritten pages numbered in said transcript consecutively from 1 to 304, and that a copy of all that transcript is set forth in those parts of said 2007 pages which precedes said figures 221 on said page 129, that is, the first 205 side pages of that printed volume, and of the parts of said printed volume which follow said figures 206 on said page 1927, and that said transcript so transmitted did not and does not contain any copy of any bill of exceptions other than a copy of a bill of exceptions set forth at pages 125 to 128 of said printed volume, which was a bill of exceptions taken by said Hillmon, and conflicts with any statement or claim in any other paper or bill of exceptions that said Hillmon approved thereof.

From all which and the other evidence bearing on such matter, it is certain that the part of said printed volume containing said 2007 pages, which is between said figures 221 on said page 129 and the figures 206 on said page 1927, is not any part of the record or of any proceedings or bill of exceptions made, taken, or prepared in any case in or to which said petitioner, The Connecticut Mutual Life Insurance Company

aforesaid, was a party or defendant in said Circuit Court for the District of Kansas.

And that the clerk of the Circuit Court for the District of Kansas did not ever certify that the same said 1798 pages or any part thereof were part or that much of any record, proceedings or bill of exceptions made, had or taken in any case to which said respondent and petitioner were both parties. And, therefore, said Hillmon claims that the same is not relevant to the case in this Court, and should not be certified, returned or made as or to be part of any record in this Court or of any record in any court in any case in or to which both said petitioner and respondent are or were parties, and therefore irrespective of any other reason and notwithstanding anything else shown in this case, said Hillmon asks that the aforesaid motion be overruled as to said 1798 pages, part of said printed volume, and that the clerk of said Circuit Court of Appeals be by this Court ordered and directed to not ever send any part of what is set forth on said 1798 pages, that is between said figures 221 on said page 129 and the figures 206 on said page 1927, as any part of any record or proceedings in any return he may make to said writ of *certiorari;* and to require him to limit his return thereto to a copy of such transcript as was in answer to the first aforesaid writ of error by the clerk of said Circuit Court for the District of Kansas returned to said Court of Appeals with that writ of error, that is, to said citation and writ of error and the first aforesaid 304 pages which constituted the transcript first aforesaid, and of such orders and proceedings as were had, made and done in said Court of Appeals in Case No. 1451 therein, and this without including or returning any pretended copy of any bill of exceptions taken or which purport to have been taken in the

aforesaid Case No. 3147, wherein said Hillmon was plaintiff, and the Mutual Life Insurance Company of New York aforesaid, was defendant.

And against any claim that may be made by petitioner that the aforesaid objected to part of said printed volume, that is, the 1798 pages thereof between the aforesaid figures 221 on page 129 and the figures 206 on said page 1927 because of any order of June 7, 1900, shown on printed pages 2012 and 2013 filed herein made in said Court of Appeals, became or should be considered or treated as a part of any record or proceedings between said petitioner and said respondent, it is submitted that Section 921, page 175 R. S. of 1878 does not authorize or empower any court to make any part of the record in one case a part of the record of or in any other case, and therefore we submit said order was and is void as against respondent.

And said respondent in and by her brief filed in said Circuit Court of Appeals in Case No. 1451, the case in which that Court rendered the judgment of affirmance which this Court is now asked to review, made objection to the aforesaid objected to parts of said printed volume being considered or treated as part of the record, this as shown on pages 34, 35, 36 and 38 of that brief and elsewhere therein, a copy of which brief is herewith filed in this Court, and therefrom as well as from pages 4 and 5 of the brief for respondent heretofore filed herein in opposition to the application for a writ of *certiorari*, it appears that said Hillmon has on all proper occasions objected to the aforesaid objected to part of said printed volume or the matter thereof being considered either in said Circuit Court of Appeals or in this Court or treated as a part of the record of the case in which she re-

covered the judgment complained of and that she has not ever waived that objection.

Said Hillmon did not cause said printed volume or any part thereof to be printed, nor was she ever called on to state or specify what should be printed in said Case No. 1451, nor is there anything in the most remote manner indicating that she was responsible for the same or any part thereof being printed.

Second. And for a further objection to the aforesaid objected to part of said printed volume, we request attention to the words, "Connecticut Mutual Life Insurance Company of Hartford, Connecticut," where the same appear on page 1926 of said printed volume, and refer to the affidavit of George F. Sharitt, clerk of said Circuit Court for the District of Kansas, filed herein, wherein he testifies among other things to the effect that the last named company, that is, said petitioner, did not take any such bill of exceptions in the aforesaid Case No. 3147 in that Court, as indicated by said objected to part of said printed volume, and that the only bill of exceptions that was filed in said Case No. 3147 (see the aforesaid page 129) in said Circuit Court for the District of Kansas in A. D. 1900 (other than certain exceptions taken on behalf of said respondent), was a bill of exceptions for and on behalf and of the Mutual Life Insurance Company of New York aforesaid, and that the name, "Mutual Life Insurance Company of New York," is therein in the place and instead of the name of said petitioner in the place corresponding to that where the name of said petitioner appears on page 1926, from which aforesaid affidavits and the other evidence in the case it is clear and certain that the aforesaid words, "Connecticut Mutual Life Insurance Company of Hartford, Connecticut," are not in

any actual or ever existing bill of exceptions taken or filed in the last named case in said Circuit Court for the District of Kansas in A. D. 1900, or of, concerning, or relating to any trial had in A. D. 1899, in such connection as indicated on said page 1926.

And in this connection we refer to the affidavit of respondent, Sallie E. Smith, formerly Sallie E. Hillmon, filed herein, and to the copy of an agreement therein mentioned, which shows that on the 6th day of August, A. D. 1900, the litigation between her and the Mutual Life Insurance Company of New York was by agreement settled, and that the last named company then paid her $22,000.00 in satisfaction of the judgment she had recovered against that company, and of all claims whatsoever arising out of the policy of insurance of that company on which she recovered that judgment; and that in consideration of certain premises, it, that company, then in and by said agreement agreed to and with said Hillmon that it should and would immediately dismiss its writ of error, that is, its proceedings in error against said Sallie E. Hillmon, then pending in said Court of Appeals, at its own cost, and that said company should and would pay all costs in that proceeding in error, including the cost of the transcript and copy of record filed therein. And, of course, neither that company nor the aforesaid petitioner can take any advantage of any failure on the part of that company to dismiss its proceeding in error and pay all such costs immediately after said agreement was made, which was long before said volume was printed.

And by reference to the affidavit of L. B. Wheat, filed herein, as well as to page 3 of the aforesaid motion of petitioner, it will appear that the aforesaid printed volume was printed by direction of said petitioner after the 27th of September, 1900, without said

respondent being in any manner responsible for the printing of that volume or of any part thereof.

It is shown by the case of Thorp v. Bonnifield, 177 U. S. 15, etc., that after said settlement agreement was made the Mutual Life Insurance Company of New York could not longer prosecute its writ of error, and that the Circuit Court of Appeals had not any longer jurisdiction of or in its proceeding in error against respondent, and of course said petitioner could not through or because of that agreement of settlement obtain any rights of any kind whatever.

If the petitioner had desired to have benefit of any supposed bill of exceptions by it taken in the aforesaid Circuit Court for the District of Kansas in the aforesaid Case No. 3149 in which it was defendant in that trial court, it should have had such bill of exceptions certified to the Court of Appeals in due and proper form and manner under and in pursuance of the first aforesaid writ of error.

The said affidavit of respondent shows that Mr. J. W. Green, one of the attorneys for petitioner in the case against it in said trial court, and who appears from said page 2007 to have signed the assignments of error relied on by petitioner as one of its attorneys, knew of the aforesaid settlement agreement on the 6th day of August, 1900, the day on which it was made. His knowledge thereof was of course notice thereof to petitioner, but whether notice to petitioner or not, is, we suppose, entirely immaterial, because if petitioner chose to have left out of the first aforesaid transcript any bill of exceptions or copy thereof, it knowingly assumed the consequences, which we submit are that it could only be heard lawfully in the Court of Appeals on such record and transcript as should be filed in its own case, that is, in Case 1451 in said Court of Appeals, and as petitioner's assignments

of error set forth in said printed volume are based on what it, the petitioner, claims to have been error occuring at the trial had in 1899, it follows that it has not any assignment of error which can be properly claimed to be shown by the transcript filed in the Court of Appeals in said Case No. 1451, its proceeding in error in that Court against respondent.

And we submit that this Supreme Court has not jurisdiction to hear the aforesaid assignments of error or any thereof on or because of any bill of exceptions taken in the trial court in said Case No. 3147, certainly not when not contained in the first aforesaid transcript.

From the evidence we submit it was entirely wrong for the clerk of the Court of Appeals or the petitioner to have caused to be printed any copy of any bill of exceptions filed in the aforesaid Case No. 3147 in said trial court between different parts of the first aforesaid transcript, even if we are wrong in claiming that the Court of Appeals could not by any order it might make, make any bill of exceptions taken and filed in said trial court, in said Case No. 3147 a part of the record of or in either Case No. 3149 in said trial court, or part of the record in said Case No. 1451 in said Court of Appeals, we still claim that petitioner cannot be heard on or as to the aforesaid 1798 pages of said printed volume, the parts thereof between the aforesaid figures 221 on page 129 and the figures 206 on said page 1927 thereof because of any order made in or by said Court of Appeals.

The order of June 7, 1900, of that Court of Appeals, set forth at the aforesaid pages 2012 and 2013, states in substance that the two referred to bills of exceptions were *identical*.

We submit that said Court of Appeals did not have jurisdiction to try or determine whether any such

supposed two bills of exceptions were *identical* or not. But if we are wrong in that, and if that Court of Appeals could or had jurisdiction to try or determine such question, then it follows that any such supposed bill of exceptions filed in said trial court in Case No. 3149 therein was taken and entitled in the case of Sallie E. Hillmon, plaintiff, vs. The Mutual Life Insurance Company of New York, defendant, Case No. 3147 in said trial court (see said page 129), and as from the aforesaid affidavit of Sharritt, clerk of said trial court, it appears that there was not in said Case No. 3147, the last named case, any bill of exceptions ever filed in A. D. 1900 purporting to have been taken by said petitioner, or with its name therein in the place where its name is on the aforesaid page 1926, and if such two supposed bills of exceptions were *identical*, and if said affidavit of said clerk of the trial court cannot be heard or considered as against said printed volume or any evidence that may be shown herein, even if it should be shown that the copy of any record in Case No. 1450, the case in which the Mutual Life Insurance Company of New York was plaintiff in error against respondent, showed the name of the petitioner where it ought not to have been, still we submit the petitioner cannot be heard on or as to the aforesaid objected to parts of said printed volume, said 1798 pages thereof.

From the evidence in the case, it appears *prima facie* at least that the petitioner did not ever take any bill of exceptions entitled in the case against itself in said trial Court, if said bill of exceptions are identical.

What case the bill of exceptions is in is shown by the entitling thereof at its commencement (see said page 129), and of course one person cannot take a bill of exceptions in a case in which it is not a party, and afterwards have the same by some other court

made part of the record in another case to which it is a party.

And from the evidence in the case, it appears that by mistake or otherwise the matter of bills of exceptions, filed on the 2d of April, 1900, has been made to appear in some of the papers different from the facts, for whom the bill of exceptions were taken, at least as to who prepared and took those referred to on said page 1926, after the figures 2404 on that page 1926.

If the clerk of the trial Court made the mistake as to the name of the company at the place indicated on said page 1926 in any transcript signed by him, then that was done before the Mutual Life Insurance Company of New York compromised the judgment against it, and at a time when it was important for it to have a copy of its own bill of exceptions in the transcript in the case in which it was plaintiff in error, that is, in said Case No. 1450 in said Court of Appeals. Whilst after the time when it compromised the judgment against it, and agreed to dismiss its writ of error, its proceedings in error in said Court of Appeals, and to pay costs, as shown by the compromise agreement referred to in said affidavit of respondent it was no longer materially interested on the point as to what name appeared in the place where the name of petitioner is, on said page 1926. It would be hard to print such a volume as that which contains the aforesaid 2007 pages, and probably could not have been done in the time in which the same was done without taking the records, from which any thereof was printed, apart.

Third. Said respondent consents that those parts of the aforesaid printed volume which contains 2007 pages of printed matter, which precedes the aforesaid figures 221 on the aforesaid page 129 of said printed

volume and following the copy of an index at the commencement of that volume, together with the part of said printed volume which follows the figures 206 on page 1927 thereof, be taken and stand as a copy of the record in the aforesaid Court of Appeals in the case therein in which said petitioner, The Connecticut Mutual Life Insurance Company aforesaid was plaintiff in error, and said respondent, by the name of Sallie E. Hillmon, was defendant in error, the same being Case No. 1451 in said Court of Appeals, of course a duly certified copy from said Circuit Court of such orders and judgments as it made in that case and of the opinion by it filed therein, should also be added as part of the record in that case in that Court.

But and said respondent says that among other things there is and was before A. D. 1900, in the aforesaid Circuit Court for the District of Kansas certain records and papers including such journal entries and other matters as are shown in and by a copy thereof duly certified by the clerk of that Court by his certificate dated the 27th day of October, A. D. 1900, marked "Exhibit No. 1," filed herewith in this Court which said respondent asks to have made part of the record herein for the purpose of showing that certain juries shown by the aforesaid transcript to have been impaneled in that trial court were duly discharged, and also to show some of the certain other matters left out of said transcript.

And respondent is willing to make any further proper consent that would save costs or trouble that she ought to make, but, as she claims that the aforesaid objected to parts of the first aforesaid printed volume, that is, the parts thereof between said figures 221 on said page 129 and the figures 206 on said page 1927, are not part of any record certified over or by the certificate of the clerk of the trial court on said page

2007, and because of the matter about the name of the company as to who took or for whom was made the exceptions mentioned on the lower half of the aforesaid page 1926, said respondent asks this Court to order that said objected to parts of said printed volume be stricken out and not considered either a part of the record in this Court or of the record in said Court of Appeals in said Case No. 1451 therein, wherein said petitioner was plaintiff in error and said respondent defendant in error, and that as from and because of the matters aforesaid, petitioner's assignments of error have nothing in the record, as we claim it to be, which would call for review by this Court, said petitioner asks that the order allowing the writ of *certiorari* to issue herein be set aside, and that said writ of *certiorari* be recalled by this Court, and all the applications of said petitioner herein be refused and dismissed.

And because of the hereinbefore mentioned objections to the part of said printed volume which is between said figures 221 on page 129 and the figures 206 on page 1927 thereof, it would have been proper for said Court of Appeals to have disregarded the same. And if it had done so, it would have necessarily followed that the judgment of the trial court by the petitioner complained of, should have been affirmed by the Court of Appeals, irrespective of any question passed on or mentioned in the opinion of that court; and as the judgment of affirmance was right, it is not important or material to consider the points passed on by that Court of Appeals.

Sullivan vs. Iron Silver Mining Co., 143 U. S. 431.

L. B. WHEAT,
Attorney for Respondent.

Office Supreme Court U. S.
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Clerk

No. 93

Affidavits of Wheat [illegible]

Filed Nov. 18, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 316.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

SALLIE E. HILLMON.

AFFIDAVITS IN SUPPORT OF OBJECTIONS TO MOTION OF PETITIONER IN REGARD TO RECORD.

L. B. WHEAT,
Counsel for Respondent.

(18,147.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1901

Supreme Court of the United States

OCTOBER TERM, A. D. 1901.

No. 316.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

SALLIE E. HILLMON, RESPONDENT.

UNITED STATES OF AMERICA, *Eastern Judicial District of Missouri,* } ss:

The undersigned, John D. Jordan, being first duly sworn, does on oath depose and say that he was on and before the seventh day of June, A. D. 1900, and has ever since then been and still is clerk of the United States circuit court of appeals for the eighth circuit, and that on the second day of July, A. D. 1900, there was filed in the said court of appeals, in my office as such clerk thereof, at the city of St. Louis, Missouri, a transcript of certain records, papers, and proceedings of and in the case of Sallie E. Hillmon *vs.* The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, case No. 3149, in the circuit court of the United States for the district of Kansas, consisting altogether of pages "A" and "B," being an original citation to

Sallie E. Hillmon and an original writ of error, issued at the instance of the Connecticut Mutual Life Insurance Company, with the endorsements thereon respectively, and of (304) three hundred and four other typewritten pages, as numbered in said transcript, consecutively from one (1) to three hundred and four (304), a copy of all which said transcript is set forth in those parts of the two thousand and seven (2,007) pages printed by me as clerk of said court of appeals (in one volume in September and October, A. D. 1900, in case No. 1451, The Connecticut Mutual Life Insurance Company, plaintiff in error, *vs.* Sallie E. Hillmon, in said court of appeals), which precede the figures two hundred and twenty-one (221), found on page one hundred and twenty-nine (129) of said printed volume—that is, the first two hundred and five (205) side pages of that printed volume—and the pages of said printed volume which follow the figures two hundred and six (206) on page nineteen hundred and twenty-seven (1927) of that printed volume, and that said transcript, filed and docketed in said court of appeals as number fourteen hundred and fifty-one (1451), did not and does not contain any copy of any bill of exceptions other than a copy of a bill of exceptions set forth at pages one hundred twenty-five (125) to page one hundred twenty-eight (128) of said printed volume.

JOHN D. JORDAN.

Subscribed and sworn to before me by the above-named John D. Jordan this twelfth day of November, A. D. 1901.

[SEAL.] WM. MORGAN,

Clerk of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

[Endorsed:] File No., 18,147. Supreme Court U. S., October term, 1901. Term No., 316. The Conn. Mutual Life Ins. Co., petitioner, *vs.* Sallie E. Hillmon. Affidavit of John D. Jordan. Filed Nov. 18, 1901.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1901.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Petitioner*, *vs.* SALLIE E. HILLMON, *Respondent.* } No. 316.

THE UNITED STATES OF AMERICA, *District of Kansas*, } *ss:*

I, the undersigned, George F. Sharitt, being first duly sworn, do on oath depose and say that I was on the 2d day of April, A. D. 1900, and had been for several years before that time, and have ever since been and still am clerk of the circuit court of the United States for the district of Kansas.

And that there was filed in my office as such clerk, at Topeka, Kansas, under and of date of the 2d day of April, A. D. 1900, a bill of exceptions in the case of Sallie E. Hillmon *vs.* The Mutual Life Insurance Company of New York (case No. 3147 on the docket of that court), containing and consisting of 2,157 pages, as consecutively numbered, and that the same remains and still is on file in my office as such clerk, and that the last page thereof—that is, page 2157 thereof as so numbered—is the page on which is the

certificate and signature of the judge thereto, and said page 2157 is in the words and figures following, to wit:

And now, inasmuch as the exceptions herein set forth and preserved are not of record in said cause and are not available to the defendant for review by the circuit court of appeals of the eighth judicial circuit, or the Supreme Court of the United States, except by means hereof the defendant, The Mutual Life Insurance Company of New York, has, by leave of court first duly had and obtained, and within the time limited therefor, prepared, and does now present to the court for allowance, settlement, and signing, this its bill of exceptions of said trial, and the court having examined the same and being satisfied that it is a true and complete bill of exceptions of said trial; that it contains all the evidence offered by the parties and admitted by the court, and all written evidence offered by the defendant and excluded by the court, except certain original exhibits admitted in evidence, which by order of the court will be transmitted to the said circuit court of appeals; that it was prepared within the time limited therefor, and that it has received the approval of the adverse party, does now

Settle, allow, and sign the same as a true and complete bill of exceptions of said trial, and does order that it be sealed and filed with the papers and record in said cause, to the end that it may be made a part of the same; which is accordingly done this 2nd day of April, 1900.

WILLIAM C. HOOK, *Judge.* [SEAL.]

And affiant further on oath deposes and says that the name "William C. Hook," above the word "judge," on said page 2157, was written by William C. Hook, the judge of

the district court of the United States for the district of Kansas, and is—that is, said name, "William C. Hook," is in his handwriting as written on said page, and that I am and have been for several years well acquainted with his handwriting, and have seen him write his signature many times, and that is his genuine signature as written on page 2157 of said original bill of exceptions.

And that said bill of exceptions is and was entitled in the above-named case of Sallie E. Hillmon, plaintiff, against The Mutual Life Insurance Company of New York, defendant, No. 3147, in said circuit court, and that said bill of exceptions is the only bill of exceptions that was filed in said case in A. D. 1900, or at any time since I have been clerk of said court, other than certain exceptions taken on behalf of said Hillmon, as of the same date, relating to objections and exceptions to the above said bill of exceptions.

And that there has not ever been filed in my office as such clerk, since I have been clerk of said circuit court, any bill of exceptions on behalf of the Connecticut Mutual Life Insurance Company in said case No. 3147, wherein said Sallie E. Hillmon is plaintiff and The Mutual Life Insurance Company of New York is defendant.

GEORGE F. SHARITT,
Clerk United States Circuit Court.

Subscribed in my presence and sworn to before me this 13th day of November, A. D. 1901.

[SEAL.] FRANK L. BROWN,
Clerk United States District Court,
By HELEN BUCKENAXTER, *Deputy.*

[Endorsed:] File No., 18,147. Supreme Court U. S., October term, 1901. Term No., 316. The Conn. Mutual Life Ins. Co., petitioner, *vs.* Sallie E. Hillmon. Affidavit of George F. Sharitt. Filed Nov. 18, 1901.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1901.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Petitioner*,
vs.
SALLIE E. HILLMON, *Respondent*. } No. 316.

THE UNITED STATES OF AMERICA,
State and District of Kansas, Leavenworth County, } *ss:*

I, the undersigned, Sallie E. Smith, being first duly sworn, do on oath depose and say that I am the same person who, as Sallie E. Hillmon, was plaintiff in case No. 3149 in the circuit court of the United States for the district of Kansas, and that some years after the commencement of that action I married one James C. Smith, and I am now the wife of said Smith, and that on the 6th day of August, A. D. 1900, a certain agreement was made between myself and others, parties of the first part therein, and The Mutual Life Insurance Company of New York, the party of the second part therein, a copy of which agreement as written and signed, with a certificate of acknowledgment thereof thereon, is herewith filed, hereto attached, and made a part hereof, and referred to for a description of the same.

And affiant further says that J. W. Green, Esq., one of the attorneys for the above-named petitioner in this court, was present when that agreement was made.

And affiant further deposes and says that she did not ever cause to be printed or consent to the printing of any part of the printed volume containing 2,007 pages, as numbered, of printed matter referred to in the proceedings in the above-entitled case, and that she did not herself know that the same or any part thereof was to be printed until after the same had been printed.

SALLIE E. SMITH.

Subscribed in my presence and sworn to by the above-named Sallie E. Smith before me, the undersigned, a notary public in and for the county of Leavenworth, in the State of Kansas, this 15th day of November, A. D. 1901.

My commission expires on the 31st day of August, A. D. 1904.

[SEAL.] DAVID W. FLYNN,
Notary Public.

UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

SALLIE E. HILLMON, *Plaintiff,*
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Defendant.*

Indenture made this sixth day of August, 1900, between Sallie E. Hillmon of city of Leavenworth, county of Leaven-

worth, State of Kansas, and L. B. Wheat and John H. Atwood of the said city of Leavenworth, county of Leavenworth, Kansas, and Samuel A. Riggs of Lawrence, county of Douglas, State of Kansas, and C. F. Hutchings of Kansas City of the county of Wyandotte, State of Kansas, parties of the first part, and The Mutual Life Insurance Company of New York, a corporation of the city, county and State of New York, party of the second part:

Whereas in a certain action pending in the circuit court of the United States for the district of Kansas, between Sallie E. Hillmon as plaintiff, and The Mutual Life Insurance Company of New York as defendant, which action was brought to recover moneys claimed to be due under a certain policy of life insurance issued by said insurance company December 10, 1878, for the sum of ten thousand dollars ($10,000.00) on the life of John W. Hillmon, husband of said Sallie E. Hillmon.

A judgment in said action was duly rendered and entered in the circuit court of the United States for the district of Kansas, at the June term, 1899, against said insurance company, in favor of said Sallie E. Hillmon, for the sum of twenty-two thousand and sixty-eight dollars ($22,068.00) and costs.

And whereas, the parties to said action have mutually consented to a settlement thereof, and the party of the second part has paid to the said Sallie E. Hillmon, one of the parties of the first part, the sum of twenty-two thousand dollars ($22,000.00) in full satisfaction of said judgment and all claims whatsoever, arising out of said policy of insurance.

Now therefore, the said Sallie E. Hillmon, does hereby in consideration of the said payment of said sum of twenty-two thousand dollars ($22,000.00) receipt whereof is hereby acknowledged, release and forever discharge the said Mutual Life Insurance Company of New York, its successors and assigns, of and from all actions, causes of actions, suits, controversies, claims and demands whatsoever she has or claims against said company on under or by reason of said policy. And said L. B. Wheat, John H. Atwood, Samuel A. Riggs, and C. F. Hutchings, for value received, do wholly release and discharge any and all liens that they or either of them may have, against said Mutual Life Insurance Company, for compensation as counsel, attorney or otherwise, for the said Sallie E. Hillmon, upon the said judgment.

And in consideration of the premises, the said company hereby agrees to and with said Sallie E. Hillmon that it shall and will immediately dismiss its writ of error, that is its proceedings in error against said Sallie E. Hillmon, now pending in the United States circuit court of appeals in the eighth circuit, at its own cost and that said company shall and will pay all costs in that proceeding in error, including the cost of the transcript and copy of record filed therein, and in further consideration of the premises, said company hereby releases, acquits and discharges said Sallie E. Hillmon of and from all and any claims, demands and causes of action and rights of law or claims against her.

This agreement and said settlement shall not in any manner affect the Connecticut Mutual Life Insurance Company of Hartford Connecticut.

In witness whereof, said parties of the first part, hereunto

set their hands and seals, the date and year first above written.

SALLIE E. HILLMON.
JOHN H. ATWOOD.
L. B. WHEAT.
SAM'L A. RIGGS.
C. F. HUTCHINGS.
THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK,
By F. L. ALLEN, *Agent.*

Attested: FREDMAN L. ALLEN.

STATE OF KANSAS, }
Leavenworth County, } *ss:*

Be it remembered that on this sixth day of August, 1900, personally came before me Sallie E. Hillmon, L. B. Wheat, John H. Atwood, Samuel A. Riggs, and C. F. Hutchings and F. L. Allen, agent, to me personally known to be the same persons who executed the above and foregoing instrument in writing, and duly acknowledged the execution thereof.

BENJAMIN F. ENDRES,
[SEAL.] *Notary Public.*

My commission expires Oct. 24th, 1903.

[Endorsed:] File No., 18,147. Supreme Court U. S., October term, 1901. Term No., 316. The Conn. Mutual Life Ins. Co., petitioner, *vs.* Sallie E. Hillmon. Affidavit of Sallie E. Smith & exhibit. Filed Nov. 18, 1901.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1901.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Petitioner*,
vs.
SALLIE E. HILLMON, *Respondent.*
No. 316.

THE UNITED STATES OF AMERICA,
State and District of Kansas, Leavenworth County, ss:

I, the undersigned, L. B. Wheat, being first duly sworn, do on oath depose and say that I am and have been for many years one of the attorneys of and for the respondent in the above-entitled proceeding in the matter of the litigation between her and the above-named petitioner, and, because of being such attorney, I did, on the 26th day of September, A. D. 1900, write and mail in a postage-prepaid envelope to John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, a letter of that date, of which a copy, marked "Exhibit B," is hereto attached and herewith filed, and that afterwards and about the 28th day of September, A. D. 1900, I received from said Jordan, clerk as aforesaid, a certain letter dated of the 27th of September, 1900, in answer to my aforesaid letter, a copy of which letter from said Jordan, marked "Exhibit A," is hereto attached and herewith filed.

L. B. WHEAT.

Subscribed and sworn to by the above-named L. B. Wheat in my presence and before me, the undersigned, a notary

public in and for the county of Leavenworth, in the State of Kansas, this 15th day of November, A. D. 1901.

My commission expires August 31st, 1904.

[SEAL.] DAVID W. FLYNN,
Notary Public.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

John D. Jordan, clerk; Geo. F. Haid, ass't clerk.

ST. LOUIS, MO., *September 27th*, 1900.

L. B. WHEAT, Esq.,
Leavenworth, Kansas.

DEAR SIR: Yours of the 26th inst. received. The plaintiff in error in the case of Connecticut Mutual Life Insurance Company *vs.* Hillmon, No. 1451, has made the deposit and has directed the record to be printed.

Yours truly, JOHN D. JORDAN, *Clerk.*

"Exhibit A."

LEAVENWORTH, KS., *Sept.* 26, 1900.

JOHN D. JORDAN, Esq.,
Clerk U. S. C't Ct. of Appeals, St. Louis, Mo.

D'R SIR: Yours of 22nd inst. rec'd. Because of what you therein say and of your omitting to say that plaintiff in error has requested or made deposit to pay for printing of the record in case No. 1451, The Connecticut Mutual Life Insurance Company *vs.* Sallie E. Hillmon, in said court of appeals, I am afraid you may have construed

my letter of 21st inst. as including a request that you cause that record to be printed. I have not intended to and do not request you to cause said record or any part thereof to be printed. Please do not cause any printing to be done because of anything I have said or written you.

I had hoped that if plaintiff in error caused any printing to be done it would, under rule 23, select comparatively small parts of the record to print.

And I still fail to understand how or why a copy of a bill of exceptions taken by another company and copied in another record can be treated or printed as a part of the record first above mentioned; and I claim it is not part thereof.

Yours, &c., L. B. WHEAT.

"Exhibit B."

[Endorsed:] File No., 18,147. Supreme Court U. S., October term, 1901. Term No., 316. The Conn. Mutual Life Ins. Co., petitioner, *vs.* Sallie E. Hillmon. Affidavit of L. B. Wheat & exhibits thereto. Filed Nov. 18, 1901.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 316.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

SALLIE E. HILLMON, RESPONDENT.

Rejoinder of Respondent to the Reply of Petitioner in the Matter of the Motion Pending, Relating to What Shall Stand as or in Place of a Certified Transcript Herein, &c.

As we understand the situation herein, under claim of a question as to cost the petitioner seeks to have determined a controverted question relating to what can be considered the record in the court of appeals in the case therein, No. 1451, wherein the petitioner was plaintiff in error and respondent was defendant in error.

Respondent is as anxious as any one can be to save costs, expense and trouble, and would do anything reasonable so to do that would not prejudice her case.

We are not seeking to have anything that was of record in the court of appeals in said case No. 1451 left out, but we submit that the objected-to part of the printed volume of 2,007 pages mentioned in respondent's objections heretofore filed herein (consisting of 1,798 printed pages), commencing at the figures 221 on page 129 and extending to the figures 206 on page 1927 thereof, cannot properly be treated, considered, or held to be a part of the record in said case No. 1451, either in the court of appeals or in this court.

Surely the printing thereof in that printed volume did not make it a part of the record of that or of any court, in any case.

The affidavits filed and printed herein of Sharitt, clerk of the trial court, and Jordan, clerk of the court of appeals, considered together, leave the said objected-to part of said printed volume, on all the showing as yet made in this court, a mere *waif*, with no file-mark thereon showing it was ever filed in the court of appeals, and without any certificate whatever of the clerk of the court of appeals applicable thereto; and said affidavit of Sharitt, clerk of the trial court, shows that there was not ever filed in the trial court in case No. 3147, the case therein in which Sallie E. Hillmon was plaintiff and The Mutual Life Insurance Company of New York was defendant, any such bill of exceptions as indicated by said objected-to part of said printed volume; this because of the matter about the name of the petitioner shown on page 1926 of said printed volume, referred to in our aforesaid objections and as to which the said affidavit of Sharitt is applicable.

We have not supposed it of any practical use to raise any question as to whether there were two bills of exceptions,

actually *identically* alike, filed in the two cases, No. 3147 and No. 3149, in the trial court—that is, in the United States circuit court for the district of Kansas—or not; this because we suppose the order of June 7, 1900, of the court of appeals, set forth at printed pages 2012 and 2013, is EITHER *res adjudicata* on such question or utterly void.

We claim it is void, as not being matter which the court of appeals had jurisdiction to hear, try, or determine in such case, on motion or otherwise.

If it should ever become proper to offer evidence on the subject as to whether there were two such bills of exceptions, actually *identically* alike, filed in said cases, No. 3147 and No. 3149, then in behalf of respondent it will be claimed, and she will need proper time and opportunity to prove, that, irrespective of any question about what case either thereof was entitled in, or as to what name appears therein at a place corresponding to where the name of the petitioner appears on said page 1926 of said printed volume, other discrepancies existed at the time and soon after—for a while at least—the time when the respective bills of exceptions were signed by the judge of the trial court and filed in that court. What the extent or materiality of such discrepancies were I do not know, as I never heard thereof until within the last few days, and I was not present when the same were signed or filed and have not since ever compared the same, but on information I believe such discrepancies so existed in relation to matters of correction in one of the bills of exceptions made before signing or filing thereof, but omitted either accidentally or purposely—accidentally, I suppose, in the other; but we are not now asking time to make such proof, because we suppose

said order of June 7, 1900, is either *res adjudicata* against us or void and of no effect whatever; but whether *res adjudicata* or void, it of course does not pretend to establish any claim against the force or effect of the aforesaid affidavits, or of the facts thereby respectively shown; that order of court, of course, only related to what the court of appeals supposed existed in the trial court, and was made before any certificate dated of the 20th of June, 1900, shown on page 2007, was filed in the court of appeals.

And in view of the matter relating to the name of the petitioner appearing where it does on said page 1926 of said printed volume, and of the facts shown by said affidavit of Shuritt, clerk of the trial court, the statement herein about such discrepancies once existing are left to apply to a time when and soon after those bills were filed. Whether they still exist or not I do not know or make any claim. There has not been any order of the trial court shown (or made) concerning such matter of discrepancies.

The petitioner is here now insisting on having the case in this court heard and determined as though said objected-to part of said printed volume was a part of the record in case No. 1451 in the court of appeals, notwithstanding it is, as aforesaid, left a waif, as aforesaid, by the evidence and certificates herein, all of them being duly considered.

And, further, we submit it is evident that said objected-to part of said printed volume was not a bill of exceptions taken, prepared, or filed in case No. 3149 in the trial court, and that there was not taken, prepared, or filed in case No. 3147 in the trial court any bill of exceptions corresponding to said objected-to part of said printed volume, with the name of petitioner therein at the place corresponding to

where that name—that is, the name of petitioner—is found on page 1926 of said printed volume; and we submit it was long since up to petitioner to explain and show why and how its name came to appear on said page 1926, and why it does not concede its name ought not to appear in such connection as it is there found, and also why it does not concede that any supposed copy of any supposed bill of exceptions ought not to have shown its name in any such corresponding place in relation to any bill of exceptions filed in said case No. 3147 in the trial court. We suppose it proper to ask whether it supposes it is in better position because of its name being, as a result of either intentional wrongful act on the part of some person or of accidental mistake in copying from some original bill of exceptions, there on said page 1926 in the connection it is, puts it into better position than it would be in if the name of the Mutual Life Insurance Company of New York there appeared instead of its own name. However all that may be, we submit that it ought not to have any further hearing on its assignments of error on the basis or supposition its name appears in any original bill of exceptions taken, prepared, or filed in the trial court in case No. 3147 in a place corresponding to where it is on said page 1926. (And if the two bills of exceptions mentioned in said order of June 7, 1900, are exactly alike in all respects, then said petitioner is without any proper bill of exceptions, even in case No. 3149, this because of the matter relating to its name on said page 1926; said order, if correct, proves too much for petitioner's good.)

Why petitioner should seek to have this court finally hear this case on a supposed record, indicating it took, pre-

pared, and filed, as indicated by its name being where it is on said page 1926 of said printed volume, such a bill of exceptions in said case No. 3147 in the trial court as would appear if the objected-to part of said printed volume is accepted as part of the record herein in face of the affidavits of said clerks is, I submit, a matter of wonder at least.

It will also be noticed that there is nothing in any supposed record indicating that petitioner was given leave or had any time extended to or for it, petitioner, to take a bill of exceptions in case No. 3147, other than the statement on said page 1926, in connection with the name of petitioner, and the affidavit of Sharitt, clerk, shows the name of petitioner is not at any place corresponding to where it is on said page 1926 in any actual bill of exceptions filed in case No. 3147 in the trial court.

Referring to what is on page 3 of the aforesaid Reply about what the clerk of the court of appeals may have said in a letter about records not having been out of his possession *since the same were printed*, it is submitted all that is immaterial. The contention relates to what took place *before that* printing was actually done, completed, and to what should or should not have been printed. The printing of that volume of 2,007 pages surely made nothing *record matter* which was not before then and otherwise matter of record in case No. 1451 of said court of appeals.

If petitioner's contention is correctly understood by me, it is to the effect that because the clerk of the court of appeals printed said 2,007 pages in one volume, with 1,798 pages thereof—the objected-to part thereof—between what was pages 205 and 206 of the transcript from the trial court, that therefore, merely *because* of such printing, said ob-

jected-to part became part of the record in said case No. 1451 in the court of appeals, and respondent submits such contention ought not to be sustained; and, further, that although the court of appeals may have passed on the assignments of error the same as though such objected-to part of said printed volume was properly before it for consideration, still, as all the court of appeals did in relation to any matter of contention herein was on application of petitioner, it (petitioner) cannot be heard to complain of the court of appeals looking at said objected-to part of said printed volume; and as the judgment of affirmance rendered by the court of appeals was such judgment as would properly and necessarily have been rendered if the objected-to part of said 2,007 pages had not been printed or before the court of appeals in any form or shape, either as waif matter or otherwise at all, the matter of said court of appeals having passed on questions not shown otherwise than by said objected-to part of said volume is not now material, as shown by the before-cited case of—

Sullivan *vs.* Iron Silver Mining Co., 143 U. S., 431.

Attention is requested to the fact that the writ of certiorari heretofore allowed herein appears to have been granted without any such certificate as appears to be required by subdivision 3 of rule 37 of this court, and without any such affidavit as the one last mentioned on page 6 of the printed matter following the pending motion herein having been printed for use on the hearing of the application for said certiorari; even if it had been printed, we see it conflicts with the before-mentioned affidavits of the clerks of the trial court and of the court of appeals.

And respondent asks that on consideration of all the matter bearing on the questions involved, the objected-to part of said printed volume be disregarded and stricken out and the writ of certiorari recalled, and the case here dismissed at petitioner's cost, because if that part of the printed volume is rejected, or even if the name of the Mutual Life Insurance Company of New York is in effect placed or considered to be where the name of petitioner is on said page 1926, there is, we submit, no pretense for cause of reversal of any judgment on any exception preserved by petitioner.

Attention is requested to the fact that the printed matter on pages 2009 to 2031, fastened at the end of the aforesaid printed volume of 2,007 pages, etc., as numbered, is a matter entirely separate from said printed volume, and that the original of those printed pages 2009 to 2031 is to be found in a separate document, not attached by the clerk of the court of appeals to said printed volume; and, further, the certificate of the clerk of the court of appeals, found on pages 2030 and 2031, does not purport to certify as to any of the matter shown on said 2,007 pages of said printed volume, and that the certificate of Sharitt, clerk of the trial court, shown on aforesaid page 2007, is shown by the affidavit of Jordan, clerk of the court of appeals, to be not applicable to said objected-to part of said printed volume, and the affidavit of Sharitt shows that there was not any such bill of exceptions filed in the trial court in case No. 3147, as it would be if the name of the petitioner was therein at a place corresponding to where the name of petitioner is on said page 1926.

We submit, petitioner seeks to have it appear to this court that it took, prepared, and filed, under leave given it, such

a bill of exceptions in case No. 3147 as said objected-to part of said printed volume would indicate if it was a correct copy of anything. We submit, the evidence clearly shows it never took, prepared, or caused to be filed, or had leave to file, or had time extended for it to prepare, such a bill of exceptions in case No. 3147.

To show it (petitioner) had time in which to prepare such bill of exceptions would need an order of court in case No. 3147, because the 2d of April, 1900, the day on which it purports to have been filed in the trial court, was long after the June term, 1899, the term at which the trial was had, and the next following term, to wit, the November term, 1899, of the trial court had been, as required by law, commenced and intervened between the trial and the 2d of April, 1900.

If this court shall determine and hold that the objected-to part of the aforesaid printed volume is part of the record in the court of appeals in case No. 1451 therein, then we do not see any use of requiring the clerk of that court so to certify; but, we submit, it ought to hold he could not properly so certify because of the facts stated in his affidavit, and we also submit that this court ought now to rule that the said objected-to part of said printed volume cannot be considered in this case on any assignment of error, and therefore to now dismiss this case; but if the court requires or permits return to be made to the writ of certiorari, we ask that it order that what is in the transcript returned with the aforesaid writ of error in case No. 1451 be returned separately, and as so returned to that court with said writ of error without any interpolation therein of anything in or shown by any other paper, record, or transcript,

even if it permit other matter to be also returned by itself separated from what it was not attached to when received in that court of appeals.

And we suppose that appropriate orders can be made in this court that would answer in the place of any proper return to said writ of certiorari, and thus avoid great expense and cost to the parties, if but for such orders this court shall be of opinion that return should be made to that writ.

L. B. WHEAT,
Attorney for Respondent.

NOVEMBER 22, 1901.